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In the Supreme Court
of the
United States

OCTOBER TERM 1968

No. 670

FRED BANKS,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

Brief for the Respondent

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OPINIONS BELOW

On September 16, 1964 the Court of Appeal of the State of California filed an opinion affirming petitioner's conviction for robbery and attempted robbery. That opinion, which was certified for nonpublication, is set forth in its entirety in the Appendix at pages 317-322.

By order dated November 10, 1964, the California Supreme Court denied a petition for hearing. Its order issued without opinion is not officially reported.

Following the *per curiam* decision of this Court on January 24, 1966 in *Banks v. California,* 382 U.S. 420 (1966)

granting a petition for writ of certiorari, vacating the judgment of the Court of Appeals and remanding the case "for further proceedings in light of *Griffin v. California,* 380 U.S. 609 (1965)," the Court of Appeal reconsidered and reaffirmed petitioner's conviction in an opinion filed May 20, 1966. That opinion, which also was certified for nonpublication, is set forth in the Appendix at pages 332-334. Petitioner did not file a petition for hearing in the California Supreme Court following this decision.

After the second *per curiam* decision of this Court issued on May 15, 1967 in *Banks v. California,* 387 U.S. 92 (1967) granting a petition for writ of certiorari, vacating the judgment of the Court of Appeal and remanding the case "for further consideration in light of *Chapman v. State of California,* 386 U.S. 18 (1967)," the Court of Appeal again reconsidered and reaffirmed petitioner's conviction in an unpublished opinion filed October 2, 1967. That opinion, from which review is sought here, is set forth in the appendix at pages 341-342.[1]

Again petitioner did not seek review in the California Supreme Court by filing a petition for hearing.

JURISDICTION

Petitioner asserts that he is invoking the jurisdiction of this Court under 28 U.S.C. 1257(3). For the reasons set forth below, however, it is respondent's position that this Court is without jurisdiction to consider this case.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the decision of the Court of Appeal since the judgment sought to be reviewed is not that of the highest state court.

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1. Abbreviations used hereinafter are as follows: "A." for Appendix; "R." for the trial transcript.

2. Whether comment on petitioner's failure to testify constituted error under the facts and circumstances of this case; if so, whether the comment was harmless beyond a reasonable doubt.

3. Whether petitioner was denied the right to counsel on appeal.

Petitioner raises a number of other questions which were no contained in the petition for writ of certiorari, and are not properly before this Court. They are:

1. Whether use at trial of petitioner's silence in the face of accusation constituted a violation of the privilege against self-incrimination.

2. Whether petitioner was denied his constitutional right to counsel at trial.

3. Whether the line-up and other procedures used by law enforcement officials denied petitioner a fair trial.

STATEMENT OF THE CASE

On August 7, 1962, following trial by jury, petitioner was convicted in the Alameda County Superior Court of two counts of robbery in the second degree and one count of attempted robbery in the second degree. Concurrent indeterminate sentences were imposed (A. 20, 21).[2] Three prior convictions were charged and admitted prior to trial (A. 20, 21).

At the trial petitioner, a 48 year old Negro male, was identified by six witnesses who were present at four different liquor stores in Oakland, California, as the person who, within the space of approximately one hour and while simulating a gun in his right hand coat pocket, robbed two

2. The statutory penalty for robbery in the second degree is an indeterminate sentence of one year to life (Cal. Pen. Code §§ 213; for attempted robbery in the second degree the penalty is imprisonment for not more than twenty years (Cal. Pen. Code § 664(1)).

stores, attempted to rob another, and was finally arrested in a fourth store.

The facts with respect to each event are as follows:

I. The Events of May 4, 1962.

A. COUNT I—THE ATTEMPTED ROBBERY AT VINCE'S LIQUOR STORE, CORNER OF 12th AND PERALTA STREETS IN OAKLAND.

On Friday night, May 4, 1962 at approximately eleven o'clock, a man identified at trial as the petitioner, entered Vince's Liquor Store, located at the corner of 12th and Peralta Streets in Oakland, California (A. 54-55, 108). Mr. Roger Wong, a co-owner of the store, and Mr. Harry Jow, an employee, were waiting on the five to six customers present (A. 54-55, 65, 108). Each was standing at separate cash registers located approximately five feet apart at a counter (A. 55-56, 109-110).

Petitioner walked to the rear counter at which Mr. Jow was working, and stood directly across the counter from him at a distance of approximately 2½ to 3 feet (A. 108, 118). When Mr. Jow said, "Yes, sir, could I help you," petitioner lifted his right hand which was inside his coat pocket as if he had a gun, and said, "Yes, give me all your money" (A. 108-109). When Mr. Jow asked petitioner again what he wanted, petitioner repeated his demand and said, "Do you want to die?" and "Then give me all your money" (A. 109).

At first Mr. Wong had not paid attention to petitioner. But when he heard these words and Mr. Jow's louder reply, "All the money?", he looked over at petitioner, and saw the pocketed hand on the counter (A. 55-56, 58, 100). He picked up a .38 pistol from under the counter at which he was working, reached over and struck the hand in the pocket (A. 57, 100). Petitioner stepped back "a little bit" and Mr. Wong took "a look" at him (A. 94-95). He ordered

petitioner to put his hands up. Instead petitioner cursed Wong and said, "Go ahead, shoot me" (A. 57, 74). Mr. Jow also told Mr. Wong to shoot, but Mr. Wong did not want to kill anybody (A. 57, 75).

Petitioner then left the store and Mr. Wong called the police (A. 57, 80). When they arrived "six or seven minutes later" he and Mr. Jow both gave a description of petitioner (A. 81-82, 112). The description included the facts that he was "stout, about 50 years old, dark complexion, sport jacket, and a shirt kind of yellow" (A. 81-82, 112). Mr. Wong also told the police that he had hit petitioner with the gun (A. 66).

At first, Mr. Wong had thought petitioner must be drunk to try to rob a store where so many customers were present, but after observing petitioner more closely, he changed his mind and even gave petitioner "lots of credit" for trying (A. 78-79, 87-89).[3]

B. COUNT II—THE ROBBERY AT THREE POINT LIQUORS ON 17th AND PERALTA STREETS.

Fifteen minutes later at approximately 11:15 p.m., a man identified at trial as petitioner entered the Three Point Liquor Store located at the corner of 17th and Peralta Streets (A. 126-127, 130-131, 142). There Mr. Robert E.

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3. Throughout his brief petitioner refers to various police reports including those made at the scene of the robbery and at the lineup (*see, e.g.,* Pet. Br. 6-7, 9, 11, 33). However, petitioner has failed to show in what way, if any, these materials are properly before the Court. These materials were identified at trial as People's Exhibits Nos. 1-17 only for discovery purposes, but were never introduced into evidence (A. 33-42). Indeed, in referring to these documents petitioner cannot comply with Rule 40 of this Court which is limited to exhibits "offered in evidence." Furthermore, these documents and the preliminary transcript were never before the Court of Appeal. *Lawn v. United States,* 355 U.S. 339 (1958); *McClellan v. Carland,* 217 U.S. 268 (1910). However, in the event these materials should be considered by the Court, they fully support the witnesses identifications and testimony at trial.

Perry, a clerk, was on duty (A. 126). Petitioner approached Mr. Perry who was standing at the counter and with his right hand in his coat pocket said, "Hand over the money" (A. 127). Petitioner was "so cool" that at first Mr. Perry thought he was kidding (A. 127, 138). Consequently, when Mr. George Griffith walked in, Mr. Perry started to wait on him (A. 127, 161). Petitioner then said, however, "If you don't want to jeopardize your life, hand over the money. And I'm not kidding." He began to wave his pocket back and forth (A. 127-128). Mr. Perry handed petitioner some money from the register, but when petitioner said, "That isn't all. Give me all of the money," Mr. Perry did so (A. 128).

In the meantime Mr. Griffith who had been standing beside petitioner started to back toward the door (A. 162, 167). As he did so, another customer, Robert Jones, entered the store and Griffith told Jones, "Man, that guy is holding up the store" (A. 162, 178). Jones, however, misunderstood Griffith and thought he said that Perry was "closing up" (A. 153, 164-165, 178). Accordingly, he immediately dashed into the store just as petitioner was backing up and almost knocked petitioner down (A. 153, 164-165, 167). He saw petitioner with money in his left hand and heard him say, "I'm desparate [sic], don't reach for nothing," and petitioner "looked back" in his face (A. 178-179, 184). After petitioner left the store, Mr. Griffith followed him "10 or 15 steps" until petitioner walked into the dark (A. 162-165).

When the police arrived in response to Mr. Perry's phone call, he gave a description of petitioner, which included his color; the fact that he had a scar on the left side of his face; and that petitioner was wearing a sport coat and hat (A. 133, 136-137). Mr. Griffith also told them that petitioner had a scar on the left side of his face, that he was wearing

a sport coat and hat, and a "yellowish-looking" shirt (A. 165-166). Mr. Jones told the police that petitioner "backed up" in his arms with money in one hand and the other hand in his pocket (A. 183). Although Mr. Perry did not know how much money he lost, or recall the amount he had told the police, he estimated the amount to be "close to a hundred dollars" (A. 129, 137, 140, 143, 147-148, 150).

C. COUNT III—THE ROBBERY AT LINDEN LIQUORS AT 1051 - 16th STREET IN OAKLAND

A short time later, at approximately 11:30 that night, a man again identified at trial as the petitioner, entered Linden Liquors at 1051 - 16th Street, where William Pauletich, a part-owner, was on duty (A. 190-191, 194). Two customers and Mr. Pauletich's mother were present (A. 191). When petitioner reached the counter at which Mr. Pauletich was standing, he had his right hand in his coat pocket pointing it at Mr. Pauletich as if he had a gun (A. 191). He seemed calm and at first both he and Mr. Pauletich "kind of hesitated for a little while" (A. 191). In fact, at one point, as Mr. Pauletich was "taking a few steps one way and another," petitioner said, "Go ahead and press the button and notify the cops, if you want" (A. 201). Mr. Pauletich's mother came over and asked what petitioner wanted (A. 192). Mr. Pauletich told her and she gave petitioner money from the register, giving him currency only as petitioner had directed (A. 192). Mr. Pauletich later estimated that his mother gave petitioner $165, in denominations of $20, $10, and $5, and between 30 to 40 $1 bills (A. 192, 194).

As petitioner was leaving the store, a customer, Sam Slaise was approaching (A. 220-221). He saw a man come out of the store with his right hand in his pocket and holding money in his left hand (A. 222-223). When Mr. Pauletich told him to watch where the man went, he followed him

down 16th Street toward Chestnut Street (A. 206, 222). In the middle of Chestnut Street the man got into a car and turned right on 18th Street (A. 224).

The police arrived at Linden Liquors shortly after Mr. Pauletich called them (A. 210). As he could recall, he described petitioner as a colored person, "about my size," wearing a sport coat and hat, with a scar or a scratch on his face (A. 195).

About half an hour later Mr. Pauletich again saw petitioner when two police officers brought him back to the store (A. 193). When the officers asked Mr. Pauletich if petitioner was the man who had robbed him, he walked to the end of the counter to look at petitioner, and said that he was (A. 199-200).

D. THE ARREST AT SOBEK'S LIQUORS AT 21st and MARKET STREETS.

The evidence later adduced at trial showed that petitioner had been arrested at Sobek's Liquor Store at 21st and Market Streets. When petitioner had entered the store shortly before midnight, he first had asked Mr. Coatsie Smith, Jr. if he was the owner (A. 226-227). After learning that Mr. Smith "just worked there," petitioner asked him if he had a gun (A. 227-228). When Mr. Smith asked why he wanted to know, petitioner said, "Well, I might want to hold you up" (A. 228). Just then Officer Harry E. Nielsen walked into the store and petitioner proceeded to ask Mr. Smith for a half-pint of Old Taylor (A. 228, 239, 246-247). However, Mr. Smith told Officer Nielsen that he did not like what petitioner had said and related the statement (A. 228). In response, Coatsie Smith was told that there had been some robberies in the area and petitioner was told that, "Buddy, you fit the description" (A. 228). When petitioner made no reply, Officer Nielsen placed him under arrest (A 233, 239.) In searching for a weapon, he discovered some

"rumpled" cash in the breast pocket of petitioner's shirt, and later at police headquarters found more money in a pocket and wallet (A. 239). In total he found $176.00, including seven $10 bills, fifteen $5 bills, and thirty-one $1 bills (A. 240-241). When Officer Nielsen asked petitioner where the money came from, petitioner responded that he had cashed a pay check that day (A. 247). At some point he also told Officer Nielsen that he did not rob anyone (A. 248).

After stopping at the Linden Liquor Store where Mr. Pauletich identified petitioner as the man who had robbed him a short time before, petitioner was taken to the Inspector's Division of the Oakland Police Department (A 240-241). Officer Nielsen, who was concerned about a gun, asked him, "What did you do with the gun, Fred?" Petitioner responded, "I didn't have a gun. If I had one, I would probably have killed somebody tonight. Guns make me very nervous." (A. 244).

II. Saturday Morning, May 5, 1962—the Lineup.

The next morning Mr. Wong and Mr. Jow of Vince's Liquors, and Mr. Perry, George Griffith, and Robert Jones from Three Point Liquors were asked to view a lineup (A. 92, 111, 130, 168, 182). They each arrived separately at police headquarters and walked in a group to the City Hall jail about two blocks away where the lineup was held (A. 168-169). During the course of an elevator ride to the viewing room on the 14th floor, Mr. Perry remarked that if he "saw the guy again in the next hundred years, I would be able to identify him, because I got a good look at him" (A. 151-152).

At the viewing room each of the witnesses stood back and went one by one to view the lineup (A. 68, 139, 171). The lineup was held in an area outside the room and was visible to the viewer by looking through glass. (A. 139, 141, 171).

The witnesses were instructed "no talking" and apparently did not hear what the others said in the viewing room. (A. 68, 139-140). No photographs were shown to them prior to viewing the lineup, and apart from testimony showing that they were told to be careful to "pick the right one," no particular instructions were given (A. 89, 139). Each of the witnesses summoned that morning either positively identified petitioner (apparently No. 3 in the lineup) or stated that No. 3 resembled the robber.

First, Roger Wong of Vince's Liquors testified that before viewing the participants he was admonished to choose "the right one" and told that "there are quite a few people in there, a different bunch we can bring in . . ." (A. 92). Because he did not "want to pick out the wrong guy" and had to "live with his conscience" he studied "very hard" before he made his identification (A. 92). When he first viewed the lineup no one was wearing a hat and, although he knew petitioner without a hat, he wanted to make certain of his identification (A. 60, 70-72). Accordingly, he asked the inspector to have the men in the lineup wear hats and when they had done so he "picked No. 3" (A. 60, 69-72). After the lineup, he walked into the corridor area where he examined petitioner's right hand and observed a black spot on top (A. 59-60, 74).

Harry Jow stated that he identified petitioner as resembling "very likely the one that come and robbed us last night," but refused to make a positive identification because the glare of the glass affected his vision (A. 116). Thus, while he told the police that "that's the fellow out there. He looks like that is the fellow," he also said that, "I am not positively sure, because the light glares on the glass and that affects my vision" (A. 116).

Robert Perry (Three Point Liquors), was the first to view the lineup (A. 135). Once he saw petitioner through

the glass he knew him immediately. (A. 130, 140-141). He, like Mr. Wong, later walked back into the lineup area with one of the police inspectors and while "face to face" with petitioner said, he was the man who held him up. Petitioner said nothing in reply (A. 131-132).

George Griffith and Robert Jones, two customers at Three Point Liquors, also identified petitioner in the lineup after petitioner put on a hat (A. 170-171, 183).

III. The Trial.

Trial by jury was held within three months after the robberies had occurred, beginning on July 30, 1962 and continuing through August 7, 1962 (A. 26, 272). Although petitioner had been represented by the public defender at the preliminary hearing, he requested that the public defender be dismissed as counsel at trial and that private counsel be apointed (see *infra* 56). When informed that private counsel could not be appointed, but that services of the public defender would continue to be available, petitioner nevertheless insisted that he would proceed in "pro per" (see *infra* 56-57). After finally permitting petitioner to act as his own counsel, the Court nevertheless insisted that a member of the public defender's staff would have to be present to act in an advisory capacity to the petitioner (see *infra* 58-61). Accordingly, counsel who had represented petitioner at the preliminary hearing was present throughout the trial (see *infra* 56).

A. THE PROSECUTION'S CASE.

At the trial the first witness called was Inspector Gilbert Zweigle who identified a number of documents given to petitioner (A. 33-42). These included statements of the witnesses, and a statement of petitioner identified as such (A. 33-40). These documents which were identified for the

record as People's Exhibits 1-17, were never introduced into evidence.

The second witness, Mr. Phillip Smith of the District Attorney's Office, identified a photocopy of a portion of an original map located in the offices of the Oakland Street Department (A. 43-44). At one point in response to petitioner's questions, he testified that it took him "a couple of minutes" to drive from Linden Liquors (the third store) to Three Point Liquors (the second store) and that "walking quickly" it would take him "five to ten minutes" to cover that distance (A. 52). He also estimated that walking at a "moderate rate" it would "probably" take him five to six minutes to walk from Three Point Liquors (the second store) to Vince's Liquors (the first store); and "walking quickly" it would "probably" take him five to ten minutes to walk from Vince's Liquors (the first store) to Linden Liquors (the third store) (A. 53).

Thereafter, the main prosecution witnesses were called. Apart from the facts already set forth, their basic testimony was as follows:

1. Vince's Liquor Store: Roger Wong and Harry Jow.

Both Roger Wong and Harry Jow identified petitioner at trial as the person who attempted to rob them (A. 55, 109). Roger Wong testified that petitioner was wearing a dark sport coat, a dark hat, and a yellow sport shirt with little yellow flowers or "spots" making a "floral pattern" (A. 56, 63-64, 82, 86, 106-107). From his view at the counter, he did not "pay attention" to the trousers petitioner was wearing (A. 86-87).

In identifying petitioner in the lineup he studied the face and clothes (A. 69, 74). However, he indicated several times that it was the "face" which was the "important thing." Thus, he said, "Clothes they can always change . . . but the face they couldn't . . ." (A. 93, 100, 103-105).

In describing the face he testified that the robber did not have a beard, and he did not think there was hair on his lower lip (A. 90-91). However, he did have a mustache and a scar on the left side of his face, although he could not recall if he had reported these features to the police (A. 75, 94-96).

Mr. Wong insisted that he told the police that he had hit the petitioner on the hand, rather than the "hand or the arm" (A. 66-67, 77, 100), and that he "still" thought his description of petitioner as being 5'6" tall and weighing 150 to 160 pounds was a close estimate (A. 82-83, 104). Finally, Mr. Wong stated that before testifying, he had not read a transcript of the preliminary hearing, nor had he seen a photograph of petitioner (A. 86, 89, 99).

Harry Jow similarly identified petitioner at trial (A. 109) and stated that on the night of the attempted robbery he wore a hat, a dark gray sport coat and a yellowish shirt (A. 110, 117). He "didn't notice the trousers, because the counter was right in the way" (A. 120).

In response to petitioner's questions, he stated that petitioner did not have hair on his chin, nor did he have a goatee (A. 113-114). However, he did have a "little mustache, a shade of it," "little" whiskers around the bottom lower lip;" and a scar on the left side of the face which he may or may not have reported to the police (A. 112-114). Although he was not "very good at weight" he had described petitioner to the police as weighing "150 to 160" or "160 to 170" pounds and as five feet six or seven inches tall (A. 112, 119-120).

When asked why he had not positively identified petitioner at the lineup, he stated that the glass at the window affected his vision. However, when he saw petitioner "right here" with "no glass between us," he knew petitioner was the robber (A. 125).

Finally, Mr. Jow testified that he had not read any notes before the trial (A. 117). However, he had seen a photograph of the petitioner about a week before when an officer served him with a subpoena (A. 117-118, 120). At that time, the picture "refreshed his memory," but it did not help him "make up his mind" that petitioner was the robber (A. 118, 120-121).

2. Three Point Liquor Store: Robert Perry, George Griffith, and Robert Jones.

Robert Perry, who had identified petitioner at the lineup, similarly identified him at trial (A. 127). He was so close to petitioner that night that petitioner "could have reached over and kissed me if he wanted to" (A. 152). When asked what he particularly remembered about petitioner, he said that he would never forget his eyes (A. 131). He also had observed a scar or mark on the left side of petitioner's face and a slight mustache (A. 129, 131, 134). While he did not pay attention to petitioner's shirt, he noted that he was wearing a "sport hat" of "oxford gray or brown" color and "a sport coat with a little check pattern" (A. 127, 129, 133).

He also stated in response to petitioner's questioning that petitioner did not have "any kind" of bandage on his face, nor any "yellow marks," and that he did not know if petitioner had any "thick or heavy" grease (A. 137-138). The only photograph he saw of petitioner was in the courtroom when petitioner showed him one (A. 135), and he did not remember reading a transcript of the preliminary hearing (A. 136).

George Griffith, who had stood "right beside" petitioner in the store, also identified him at trial (A. 161-162, 164). The Three Point Liquor Store was a "small place," well-lighted, with a light "right at the door" (A. 176-177). He recalled that petitioner was wearing a gray striped coat, a "grayish" hat, with a "rag-looking band around it," and "a

yellowish-looking shirt" (A. 165-166). On the night of the robbery, he, too, had seen the scar on petitioner's face and had told the police about it (A. 165-166).

Mr. Griffith also testified that about three weeks before trial he saw a photograph of petitioner at the District Attorney's Office. However, the picture did not refresh his memory, since he just knew "it was you when he showed me the picture" (A. 173-174). Thus, he testified that when he was shown the picture he said, "yes, that's the guy that did the robbery" (A. 174).

Mr. Robert Jones, who had almost knocked petitioner down at the Three Point Liquor Store, also said that petitioner looked like the robber "but he didn't have on the same clothes he had" (A. 179, 180). Thus, he testified that petitioner had worn a little sport hat and a sport coat "lighter than his trousers was" (A. 179, 180). He saw only the right side of petitioner's face as petitioner looked "around" in his face at a distance of about 1½ feet (A. 179, 184). He did not see any scars or a goatee on the lower lip, but did see a "little mustache" (A. 180-181). About a week and a half prior to trial, he saw a photograph of petitioner (A. 181). In response to a question by petitioner, he said that the picture did not "freshen up" his memory of the person he saw in the lineup (A. 186,187).

3. Linden Liquors: Mr. William Pauletich.

Mr. Pauletich also identified petitioner at trial (A. 191). Although he had not noticed if petitioner had a mustache, it "looked like" there may have been hair on his lower lip (A. 197). Petitioner was wearing a sport coat and hat on the night of the robbery, and while he was not certain what kind of shirt petitioner was wearing, he thought that he might earlier have said that the shirt had a floral pattern or was a "flower-type" shirt (A. 197-198, 204). Mr. Pauletich did

not recall seeing a photograph of petitioner, nor had he read the transcript of his preliminary hearing testimony prior to trial (A. 204, 220).

The remaining prosecution witnesses were Sam Slaise (A. 220-225) and Officer Nielsen (A. 238-249), and Coatsie Smith, Jr. (A. 226-234), but their testimony is set forth for the main part elsewhere in this brief.

B. THE DEFENSE.

In his defense petitioner presented the testimony of five witnesses. They were:

1. Princess Nance, who testified that she paid petitioner $140 for labor performed on April 27-30 in two $20 bills and one $100 bill (A. 251-253). She admitted she had altered the date on the bill (A. 251-252).

2. Sarah Cunningham testified that she paid petitioner $3 on "May the 7th" for labor performed (A. 253-254).

3. Joe Pollard testified on direct examination that on "May the 30th" he paid petitioner $40 and that it "seems like there was one $20 bill involved" (A. 254-255).

4. Thelma O'Hara testified that on "May 3rd" she paid petitioner $12.50 for work performed (A. 257-258).

5. Officer Richard Ticksman testified that Mr. Wong reported he struck petitioner on the hand or arm. He did not recall if Mr. Wong reported a mustache (A. 259-260). Officer Ticksman testified that Mr. Pauletich had estimated that $175 to $200 was lost (A. 261-262). Officer Ticksman also stated that the reports reflected summaries of his conversations and that he did not give the reports to the parties to be signed (A. 261, 262).

Finally, it was stipulated that in a police report Mr. Perry estimated that the robber "got a little better than $70 to $80" (A. 262-263).

C. FINAL ARGUMENT AND INSTRUCTIONS.

1. The "Opening Argument on Behalf of the People."

The "opening argument on behalf of the people" was made on the afternoon of August 6, 1962 (A. 264-272). During the course of his argument the prosecutor outlined in some detail the evidence that had been presented. First he referred to the charges made and the basic facts with respect to each (A. 264-268).

He then stated that the "main issue" was one of identification and that there were "many factors in identification which may tend to improve the faults of the identification or to make it less good" (A. 268). He then listed these factors. First, he pointed out that there was a "good opportunity" to observe the robber; that this was not a case of "momentary identification" where "the witness might see a person for just a fraction of a second" (A. 268). "Another thing" was distance, and here he referred to the fact that the identification was not "from across the street" but from "just a few feet" (A. 269). The number of witnesses making the identification was a factor urged, as was the closeness of time in making the identification (A. 269). Thus, the district attorney argued that petitioner had been identified at Linden Liquors within half an hour after the robbery, and by other witnesses within twelve hours of the offenses at the lineup (A. 269). The prosecutor argued therefore that this "isn't the kind of case where, perhaps, the suspect isn't found for weeks or months, possibly, and then the witness has to remember from the time the thing happened a month or two later . . .," but rather, he said, "This is seeing the person the very next day when the face of the person would naturally be fresh in the witnesses' minds" (A. 269). The fact that the witnesses were not shown photographs prior to the lineup was also noted (A. 269).

The prosecutor also noted that the similarity in method by which the robberies were committed was a factor to be considered (A. 270), as was the fact that the robberies had occurred within a short period of time in approximately the same area. The fact that petitioner had $176 stuffed in various pockets, including some 30 $1 bills, was also drawn to the attention of the jury (A. 270).

Finally, the prosecutor said,

> "Now, another factor which I think you can consider in a case of this kind is the failure of the person charged to take the witness stand and testify in his own behalf.
>
> "I think you will be instructed on that by the Court, and I think the instruction is to the effect that if a person does not see fit, which he, of course, does not have to do, to take the witness stand to deny evidence that has been presented against him, that you, as the jury, may consider that that evidence may—you can take that failure to testify as indicating that the Defendant would be unable to deny it.
>
> "Well, at any rate, the instruction will be given to you on the person's failure to take the witness stand, and you will, I am sure, understand it and be able to apply that to this particular case." (A. 271).

2. The "Argument in Reply by Defendant."

The next morning the petitioner made his argument in reply (A. 272-292). He urged, as he had in his opening statement (A. 250), that the case was one of mistaken identification. Throughout his closing argument petitioner repeatedly made statements of a testimonial nature. Thus, he told the jury, inter alia, at the beginning of his argument that, ". . . the robber in this case is unknown to me, although I am accused of this particular crime which they said was committed . . . ." (A. 273). Referring to Wong's ability and opportunity to see and describe the robber's features petitioner stated "I wasn't there." (A. 277). Re-

ferring to Sobek's Liquor Store, petitioner testified, "I ain't never been in this store before," that he had been "by the store" and described the general area to the jury (A. 287).

After referring to asserted discrepancies by various witnesses, the petitioner stated:

> "Ladies and gentlemen, the State's Attorney commented on why the defendant in this case failed to take the stand.
>
> One reason I didn't take the stand, ladies and gentlemen, is that I didn't believe the State had proven its case.
>
> It hadn't introduced any evidence here to show that the defendant was the robber suspect, was the guy running around robbing those people. They haven't produced any evidence.
>
> They produced evidence that he looks like the man, he is similar, those clothes are similar. That is all the evidence they produced." (A. 288).

Referring to the occasion when he was brought back to Linden Liquors when he was identified by Pauletich, petitioner stated that he "saw the officer talk to Mr. Pauletich." (A. 289). He further stated, "I had on the same hat and coat which was in evidence. Mr. Pauletich walked around the defendant and looked at him and say, 'That looks like the man.'" (A. 289). When it was pointed out that Pauletich had stated "That is the man," petitioner replied "I am telling you what was said because I was there." (A. 289).

Finally at the conclusion of his argument petitioner stated "So that is all I can say in this particular case, that I didn't rob anyone." (A. 292).

3. The "Closing Argument on Behalf of the People."

In the "closing argument on behalf of the people" (A. 293-301), the prosecutor responded by attacking petitioner's

claim of that the witnesses were impeached impeachment. He stated that cousel had "gone to great lengths to bring out what might be call [sic] slight discrepancies in the testimony" (A. 293). He then proceeded to list some of these discrepancies.

For example, he noted that while Mr. Pauletich had estimated at trial that $165 was taken, counsel "brings out" that the amount stated on the police report was between $175 and $200. There was no evidence to suggest that Mr. Pauletich had signed the report, and, the prosecutor argued a witness might later have a more accurate idea of the amount of money lost than "five minutes or so" after the robbery occurred (A. 293).

Similarly while petitioner said that Mr. Wong described the shirt "at the preliminary" as a "flowered-type pattern," Mr. Wong also said "Well, that is what I mean," when shown the shirt at trial. This, the prosecution suggested was not a "real discrepancy at all" (A. 294).

The prosecutor argued, that as a matter of fact, it would be "remarkable" if all the witnesses "had exactly the same story," or if several people viewing a person "gave exactly the same description" (A. 293-294).

He turned to petitioner's charges of "coaching" and noted that this contention had to be viewed in context. Here he referred to the fact that there were a total of six witnesses who identified the petitioner at three different robberies. Furthermore, these witnesses had viewed a lineup the following day and identified petitioner without previously having seen pictures (A. 294-295).

He argued that the fact that counsel had "brought out" that some of the police reports did not have a mustache or scar as part of the description, was an "extremely immaterial point" since there was no evidence that the officer had asked about a scar and mustache. Furthermore, the prosecutor argued, "the fact that a complete, detailed, mi-

nute description does not appear on a police report does not mean that the witness didn't see what he says he saw" (A. 296).

Similarly, he noted that contrary to petitioner's argument, the witnesses didn't say, "it looks like the man," they said, "That is the man" (A. 296).

In reviewing the lineup evidence he argued that there was evidence to show that the witnesses were told not to talk when they went to view the lineup "one by one," and each said they made the identification themselves (A. 296). There was no evidence to indicate any encouragement of one witness by another (A. 296).

The prosecutor also argued that petitioner's statement that there was no evidence to show he was the robber was "rather remarkable" in view of the eyewitness and "considerable amount of circumstantial evidence" (A. 297). Thus, the prosecutor noted that petitioner had been described by two witnesses as "cool" and "calm," and the "modus operandi" was the same (A. 298). Indeed, the prosecutor argued, the modus operandi "tends to show the same person committed those three offenses" (A. 298). Thus, he stated:

> "If you had a case, for example, where you are satisfied that one identification of the person is good identification, the other identification may not be very good, but you are satisfied that each of the offenses were committed in exactly the same way, you could reasonably make an inference that the same person, if you are satisfied committed one of the offenses, committed the other ones, too." (A. 298).

The prosecutor also noted that petitioner's failure to respond to Mr. Perry's accusation at the lineup, and his similar failure in Coatsie Smith's store, was circumstantial evidence to be considered (A. 299). After also referring to the

31 $1 bills stuffed in the pockets which was "cumpled up", the prosecutor stated:

> "Now, also, the defendant here, as you know, has failed to testify in his own defense.
>
> "I think you will be instructed on that point that where there is evidence in the case that the defendant can reasonably be expected to deny or explain because of the facts within his knowledge, and he does not testify, the jury can consider that failure as tending to indicate the truth of such evidence, and as indicating that among the various inferences that you could draw from the evidence, those inferences unfavorable to the defendant are the most probable.
>
> "And you have that situation here." (A. 299-300).

The prosecutor then turned to the testimony offered by the defense witnesses, and stated that there was no evidence to indicate that the money petitioner earned was the same money he had in his possession. He said (A. 300):

> "So there isn't a particle of evidence in this case that the same money that the defendant earned was the same money that he had in his possession.
>
> "Actually, this happened right around the first of the month, and we don't know exactly what the defendant's circumstances are because he hasn't testified before you."

Finally, the prosecutor said:

> "He says why should he have to rob. Well, that is a question you could ask of many persons who commit robberies, who might very well be employed but still commit them." (A. 300).

Finally in closing the prosecutor said:

> "At any rate, I ask you when you consider this case to consider all the evidence very carefully, and I don't think you should consider any particular piece of evi-

dence in an isolated fashion, but you should consider all of the evidence together.

"And I know that when you do so in this case that you will bring in a proper verdict." (A. 301).

4. The Instructions.

In the course of the instructions, the trial court instructed the jury:

"If you should find from the evidence that there was an occasion when the defendant, under circumstances which fairly afforded him an opportunity to reply, failed to make denial in the face of an accusation expressed directly to him or in his presence charging him with a crime for which he is now on trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, the circumstances of his silence and conduct may be considered against him as indicating an admission that the accusation thus made was true.

"Evidence of such an accusatory statement is not received for the purpose of receiving the truth but only to explain the conduct of the accused in the face of it.

"Unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement." (A. 305).

And, the Court instructed the jury that with respect to petitioner's failure to testify (A. 308-309):

"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision.

"As to any evidence of facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does

not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

"In this connection, however, it should be noted that if a defendant does not have the knowledge that would be needed to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence.

"The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

"In deciding whether or not to testify, the defendant may chose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on the defendant's part will supply a failure of proof by the people so as to support by itself a finding against him on any such essential element."

V. Appellate Review of Petitioner's Conviction.

Following his conviction, petitioner filed an appeal with the Court of Appeal of the State of California, and counsel was appointed. After briefs were filed and oral argument heard, petitioner's conviction was affirmed by the Court on September 16, 1964 (A. 317-322). On November 10, 1964 the California Supreme Court denied a petition for hearing. On January 24, 1966, this Court in *Banks v. California,* 382 U.S. 420 (1966) reversed the decision of the Court of Appeal and remanded the case for further consideration in light of

Griffin v. California, 380 U.S. 609 (1965), which had been decided in the interim.

Following the remand, the Court of Appeal notified petitioner and his counsel that they could submit further written argument if they so desired (A. 326). Thereafter the petitioner requested the appointment of a second counsel on appeal on the ground that his appointed counsel failed to see constitutional errors on the original appeal (A. 327-328). The Court of Appeal replied that no different attorney would be appointed at this stage of the proceeding and observed that petitioner's present counsel could not have anticipated the decision in *Griffin v. California.* The court further advised counsel and the petitioner that the court would take *Griffin v. California* into consideration in deciding the appeal and that petitioner and counsel could submit supplemental briefs if they wished (A. 328-329). The petitioner filed a supplemental brief in pro per and respondent filed a letter (A. 330-331). On May 20, 1966 the Court of Appeal issued a new opinion reconsidering and reaffirming petitioner's conviction under the harmless error standard set forth in the California Constitution (A. 332-334). Petitioner did not file a petition for hearing in the California Supreme Court to seek review of the Court of Appeal's decision (See Certificate by Clerk of Court of Appeal.).

Thereafter, this case was again remanded by this Court in *Banks v. California,* 387 U.S. 92 (1967), for reconsideration in light of *Chapman v. California,* 386 U.S. 18 (1967), which had been decided in the interim. Following remand, petitioner again asked for the appointment of a different counsel on the previously-stated ground that his court-appointed counsel failed to see constitutional errors at the time of the original appeal (A. 335-336). The Court of Appeal notified petitioner's counsel that if he desired to

file a supplemental brief on petitioner's behalf he could do so (A. 337). Petitioner filed a supplemental brief in pro per (A. 338). Respondent did not file a supplemental brief (A. 339). On October 2, 1967 the Court of Appeal issued its third opinion in this case. The court concluded that, under the facts presented, the *Griffin* error in this case was harmless beyond a reasonable doubt under the standards set forth in *Chapman* (A. 341-342). Petitioner did not file a petition for hearing with the California Supreme Court to review the court's decision. (See Certificate by Clerk of Court of Appeal.)

ARGUMENT

I. This Court Lacks Jurisdiction Since the Judgment Sought to Be Reviewed Is Not by the Highest State Court.

The petitioner seeks review of a decision by the California Court of Appeal issued on October 2, 1967. He did not file a petition for hearing in the California Supreme Court for a hearing. (See Certificate by Clerk of Court of Appeal.) In his brief petitioner states: "Jurisdiction rests on section 1257 (3), Title 28, United States Code." (Petitioner's Brief, p. 3). Title 28, United States Code section 1257 restricts this Court's jurisdiction to review decisions of state courts to those causes wherein a judgment has been rendered "by the highest court of a state in which a decision could be had."

The judgment of an intermediate state appellate court is that of the highest court in which decision can be had if the state law makes its decision final and unreviewable. See *Talley v. California,* 362 U.S. 60, 62 (1960). The judgment of an intermediate appellate court is not a judgment of the highest court of the state in which a decision could be had where state procedure provides for discretionary review of the intermediate appellate court's judgment in a higher

state court and such discretionary review has not been sought. *Gorman v. Washington University,* 316 U.S. 98, *rehearing denied,* 316 U.S. 711 (1942); *McMaster v. Gould,* 276 U.S. 284 (1928); *Stratton v. Stratton,* 239 U.S. 55 (1915); *Mullen v. Western Union Beef Co.,* 173 U.S. 116 (1899).

Under California law the California Supreme Court has discretionary power to review all decisions of the Court of Appeal. The California Constitution, Article VI, section 12 provides:

> "The Supreme Court may, before decision becomes final, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has jurisdiction."

California Rules of Court, Rule 28(a), provides in part:

> "Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision, . . ."

California Rules of Court, Rule 28(b), provides in part:

> "A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, . . ."

Thus, it is clear that the California Supreme Court had discretionary power to review the judgment of the Court of Appeal in the instant case.

Upon application to this Court for a review of the judgment of the state court it is the petitioner's burden to show affirmatively that this Court has jurisdiction. *Republic Gas Co. v. Oklahoma,* 334 U.S. 62, 71 (1948); *Memphis Gas Co.*

commit them." (RT 598).

you will bring in a proper verdict.

v. Beeler, 315 U.S. 649, 651 (1942). As the record fails to disclose that the judgment, review of which is now sought, is that of the highest court of the state in which a decision could be had, this Court is without jurisdiction and the writ must be dismissed.

II. The Comments on Petitioner's Failure to Testify Did Not Violate His Fifth Amendment Privilege and, in Any Event, Were Harmless Beyond a Reasonable Doubt.

At trial both the prosecutor and the judge commented upon the failure of petitioner to testify. Petitioner contends that such comment was error and was prejudicial. It is respondent's position that the comments, under the facts and circumstances of this case, did not violate petitioner's rights under the Fifth Amendment and that such comments were harmless beyond a reasonable doubt.

A. The COMMENTS WERE PROPER TO ANSWER PRO SE PETITIONER'S IMPROPER, UNPROVED STATEMENTS NOT UNDER OATH.

This case was tried prior to *Malloy v. Hogan,* 378 U.S. 1 (1964), which held the Fifth Amendment applicable to the states and *Griffin v. California,* 380 U.S. 609 (1965), which held the Fifth Amendment barred comment upon a defendant's failure to testify. The case was pending in this Court when *Griffin* was decided, so the error may still be raised. *O'Connor v. Ohio,* 385 U.S. 92 (1966). However, since the comments here were required to counter petitioner's misconduct in testifying during his cross-examination of prosecution witnesses and during his argument to the jury, there was no violation of the Fifth Amendment.

The privilege against self-incrimination may be waived; such waiver occurs when a defendant elects voluntarily to testify. *Caminetti v. United States,* 242 U.S. 470 (1917). In that case the defendant took the stand and testified as to only a portion of the prosecution's case. The trial court in-

formed the jury that, since the defendant had elected to testify, they could consider his failure to deny or explain acts of an incriminating nature that the evidence tended to establish against him in reaching their conclusion as to his guilt or innocence, *Id.* at 493. This Court upheld the instruction saying:

> "[W]here the accused takes the stand in his own behalf and voluntarily testifies for himself [citation omitted], he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it." *Id.* at 494.

See also *Johnson v. United States,* 318 U.S. 189, 196 (1943). Thus this Court has clearly held that a defendant who determines to answer part of the evidence is subject to comment as to the other evidence he does not meet. The instant case does not differ in any realistic way from *Caminetti,* for although there the defendant testified under oath, here Banks testified just as effectively by his statements during trial. Indeed, the only difference is that Banks avoided cross-examination.

Petitioner had been represented before trial by counsel and although he chose to try the case himself he consulted with counsel during trial. During trial he made his failure to take the stand a conspicuous fact that nothing could conceal. In cross-examining People's witnesses he made statements of factual claims which were simply his unsworn allegations. Under the guise of cross-examination petitioner testified concerning his weight (A. 82), that a witness never reported certain physical characteristics to the police (A. 96), to conditions of the lineup (A. 102), and during his opening statement he testified as to his residency (A. 250), and that he was mistakenly identified (A. 250).

The prosecutor understandably responded to petitioner's improper actions and the trial court necessarily informed petitioner and the jury that such statements should not be considered by them since no evidence had been introduced to support them (A. 82, 95, 102). The damaging fact that petitioner had not testified was therefore put before the jury by the petitioner's own improper conduct. Despite these warnings, however, petitioner also utilized his argument to improperly place before the jury the following matters:

"The robber in this case is unknown to me." (A. 273); "The defendant in this case is five ten and a half, ladies and gentlemen, and he weighs 180 pounds." (A. 275). Referring to the robbery of Vince's Liquor Store, petitioner said, "I wasn't there." (A. 277). Referring to Sobek's Liquor Store, petitioner testified, "I ain't never been in this store before." (A. 287). Disputing a prosecution witness' testimony, petitioner stated, "I am telling you what was said because I was there." (A. 289). Referring to an alleged statement made by him, petitioner stated, "He said he did not recall that statement, but they was made." (A. 290). Finally, at the conclusion of his argument petitioner stated, "So that is all I can say in this particular case, that I didn't rob anyone." (A. 292).

During his argument the petitioner informed the jury that he did not take the stand because the State had not proved its case since it had produced no evidence that he was the robber (A. 288). Although this remark was purportedly a response to the prosecutor's comment on his failure to testify, the explanation was in reality an attempt to justify and exculpate his own earlier improper conduct. During this colloquy the judge was required to instruct the jury that petitioner's unsworn assertions did not con-

stitute evidence and that he "can't give actually any facts except those that were given from the witness stand." (A. 290). Thus, the jury's attention was inevitably focused on the petitioner's right and failure to testify because of his decision to represent himself and try the case as he did. Indeed, the jury knew from the petitioner's statements that there was something he could say and tried to say but which they had to ignore for want of a verifying oath.

Although made during his cross-examination of witnesses and during argument rather than under oath and subject to cross-examination, petitioner's statements were clearly intended by him to be testimonial in character. Such conduct by a defendant representing himself has been held to warrant comment which calls attention to his failure to take the stand. Thus, it has been held that in a federal prosecution tactics such as employed by petitioner justify comment on the failure to testify. *Redfield v. United States,* 315 F.2d 76, 80 (9th Cir. 1963) (ruling on motion to set aside sentence); *Redfield v. United States,* 295 F.2d 249 (9th Cir. 1961), *cert. denied,* 369 U.S. 803 (1962) (ruling on direct review); *Smith v. United States,* 234 F.2d 385, 389 (5th Cir. 1956); *United States v. Yeager,* 285 F.Supp. 780 (D. N.J. 1968); *cf. United States v. Curtiss,* 330 F.2d 278 (2d Cir. 1964); see 38 Temple L.Q. 102 (1964) criticizing *Curtiss* and approving *Redfield.*

For example, in *Redfield,* the defendant persistently testified throughout trial although not under oath and he did so while purporting to act in the role of counsel and in flagrant disregard of repeated admonitions from the bench. The court there held that by such conduct the defendant waived his constitutional privilege against self-incrimination and that the privilege was not violated when the trial court subsequently advised him that he had the right to take

the witness stand, suggested that he take the witness stand, and cross-examined him.

Similarly, in *Smith v. United States,* 234 F.2d 385, 389 (5th Cir. 1956), the defendant, appearing pro se, argued with witnesses whom he was cross-examining. It was there held proper for the trial court to state " 'If you want the jury to consider what you have to say . . . you ought to testify . . . take the witness stand and testify and be subject to cross-examination. . . .' " *Id.* at 393.

In *United States v. Yeager,* 285 F.Supp. 780 (D. N.J. 1968), the prisoner did not testify in his own defense but in an attempt to establish that the rape victim was mistaken as to identification, the prisoner arose from his chair, walked around and stood before the jury next to a witness who claimed to have physical similarity to the prisoner. The court there held:

> "that where a defendant, while not actually assuming the stand and testifying during the course of the trial, indulges in demonstrative conduct which, in effect, puts into issue the truthfulness or correctness of the State's case against him, he thereby opens the door for *fair comment* by the trial judge and prosecutor under the *Caminetti* decision; and that the action of the defendant in this particular instance invited such comment by the trial judge, which comment was not unfair or unwarranted especially when a review of the transcript in the matter discloses that the defense counsel argued for three pages of the transcript regarding the identification of the defendant, Mitchell, and the defendant's witness, Forchion, and, in effect, was the first to comment upon the defendant's failure to take the stand." *Id.* at 783.

State courts have also held that when a defendant makes what are the equivalent of unsworn testimonial statements, his immunity from comment on the failure to testify is re-

linquished. *State v. Fioravanti,* 46 N.J. 109, 114-121, 215 A.2d 16, 18-23 (1965), *cert. denied,* 384 U.S. 919 (1966) (defendant waived rights under *Griffin* by voluntarily trying on pants allegedly seized from him, impliedly stating that his girth was unchanged and the pants were not his); *State v. Mayer,* 154 Wash. 667, 283 P. 195 (1929) (where defendant had a statutory right to an instruction that no inference was to be drawn from his failure to testify, the right was waived when defendant gave samples of his handwriting in the presence of the jury in order to prove that he had not written the draft of a telegram). See also *Machin v. State,* Fla., 213 S.2d 499 (1968).

To hold that petitioner's Fifth Amendment rights were violated in the instant case would extend to a defendant, acting as his own lawyer, an invitation to ignore the law and say as counsel things he could properly have said only if he testified in his own defense. To prohibit the prosecutor from commenting on such tactics and on the defendant's failure to take the stand and testify would confer upon such a defendant an improper advantage; one he could not have achieved had he been represented by counsel. This Court should not sanction such practice. It is submitted that under all of the facts and circumstances of the instant case, the comments on petitioner's failure to testify were proper and in no way violated his Fifth Amendment privilege.

B. THE COMMENT AND INSTRUCTION ON PETITIONER'S FAILURE TO TESTIFY WERE HARMLESS BEYOND A REASONABLE DOUBT.

The comment and instruction on petitioner's failure to testify were harmless beyond a reasonable doubt under the standard of *Chapman v. California,* 386 U.S. 18 (1967) where the court concluded that reversal of a conviction is not required if the reviewing court is able to declare a belief

that the comments were harmless beyond a reasonable doubt. *Chapman v. California, supra,* 24.

In the present case the Court of Appeal declared such a belief and its decision is amply supported by the record. For the facts demonstrate beyond a reasonable doubt that the comments did not contribute to the conviction. *Chapman v. California, supra,* 26.

At the outset it should be made clear that the comment made was totally unlike that made in *Chapman* where the prosecutor took full advantage of the defendant's failure to testify by "filling his argument to the jury from beginning to end with numerous references to silence and inferences of guilt." *Chapman v. California, supra,* 19. The comment made by the prosecutor here occurred but once in opening argument and twice in closing comments. Unlike the "machine gun repetition" of *Chapman,* petitioner's failure to testify here was not the point of emphasis. Further, although petitioner now objects to the trial court's instruction it was the petitioner who requested that the court give the instruction (A. 14).

As this court pointed out in *Griffin v. California,* 380 U.S. 609 (1965) it is necessary to distinguish the effect of the defendant's silence from the effect of the comment on that silence. This is particularly true in this case where during cross examination, opening statement, and oral arguments to the jury, petitioner insisted on testifying though not under oath, even after the trial court instructed the jury to disregard his unsworn testimony. Due to his misconduct the jury's attention was necessarily concentrated on the petitioner's failure to testify. The effect upon the jury of observing petitioner's misconduct during several days of trial was clearly overwhelming and negates any reasonable possibility that the comments might have contributed to the petitioner's conviction.

Moreover, when this case is viewed, as it must be, in light of the entire case presented to the jury, the conclusion may fairly be drawn that the comments did not contribute to the verdict rendered.[4]

First, that the crimes could easily be committed by one man acting alone within the distance and time period involved is not subject to doubt. Each of the four stores was located within approximately the same area, and each one was easily reached within the 50 to 60 minutes that petitioner took to range from place to place. Thus, even if the figures set forth by petitioner are used, it is shown that the first two stores were located roughly five and a half blocks apart; the second and third stores were approximately ten blocks apart (Petitioner's Brief 7, 9); while the last two stores were located approximately eight blocks apart (Petitioner's Brief 11).[5]

That the stores could easily be reached within the time period shown is established by the testimony of Phillip Smith. Thus, as he testified, "walking quickly" it would

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4. In resolving a question of harmless error, of course, only the evidence actually before the jury may be considered. See n. 3. In this connection it may be noted that the fact that the photocopy of the map on file with the Oakland Street Department (Plaintiff's Exhibit 28, R. 513), and petitioner's hat, coat, and shirt (Plaintiff's Exhibits 20, 21, 22; R. 514) are no longer available, is irrelevant to the decision to be made in this case. It is highly unlikely that the Street Department map was in any way misleading and the relative distances between the stores is preserved by the testimony of Phillip Smith. Similarly, the appearance of the clothing is preserved by the defendant's exhibits.

Apparently all exhibits were removed from the Superior Court file in April 1966 (Pet. Br. 38). In the interval since the case had been tried in 1962, however, the conviction had become final in California in 1964 and it was not until January 1966 that petitioner's first petition for writ of certiorari was acted upon.

5. For the Court's convenience we have attached the pages from the "Alameda County Popular Street Atlas" (1961) prepared by Thomas Bros. Maps, which shows the various streets to which reference is made.

take him "five to ten minutes" to walk from Linden Liquors (the third store) to Three Point Liquors (the second store) (A. 52); walking at a "moderate rate" it would "probably" take him five to six minutes to walk from Three Point Liquors (the second store) to Vince's Liquors (the first store); and "walking quickly" it would "probably" take him five to ten minutes to walk from Vince's Liquors (the first store) to Linden Liquors (the third store) (A. 53).

The veracity and accuracy of the eyewitness testimony is similarly not open to doubt. Thus, while it may be true as petitioner suggests, that the demeanor of the witnesses cannot be presented to this court sitting in an appellate reviewing capacity (Petitioner's Brief 69), their candor and honesty clearly emerges from the record. Similarly, their lack of motivation to lie or to "hedge" about the truth is apparent.

Thus, this case is totally unlike *Anderson v. Nelson,* 390 U.S. 523 (1968) where the veracity of the main prosecution witness was subject to doubt. Similarly, it is unlike *Fontaine v. California,* 390 U.S. 593 (1968) cited by petitioner (Petitioner's Brief 63), wherein the informant involved in the narcotics sale was missing. In the present case all of the critical witnesses were present.

None of the factors usually thought to contribute to mistake is presented by this case. Thus, the testimony clearly established that the witnesses had ample time and opportunity to view petitioner. At Vince's Liquors Roger Wong saw petitioner, reached over and hit him on the hand with a gun, while Harry Jow stood across the counter from him at a distance of about 2½ to 3 feet away (A. 57, 118). At Three Point Liquors the robber was so close to Perry that he could have reached over and "kissed him" while Griffith stood right beside him and Jones almost knocked

him down (A. 152, 164). At Linden Liquors William Pauletich and the petitioner stood and looked at each other "kind of hesitating" for awhile (A. 191). And although petitioner also states that the victims were "excited" the record suggests that that very fact may have tended to create a lasting impression. Perry, for example, stated that he would not forget the robber if he saw him again in a hundred years (A. 151-152). Jow stated that he could not forget someone who pointed a gun at him, or what he thought was a gun (A. 124). Wong, too, expressed a similar feeling (A. 95, 104).

Furthermore, the fact that the witnesses identified petitioner so quickly after the event belies an assertion of mistaken identification. Mr. Pauletich, for example, identified petitioner within half an hour after the robbery at a time when he would be particularly eager to have the police apprehend the right man, while there was still opportunity to do so. The other five witnesses from the other two stores identified petitioner within the next twelve hours. As we show below, the identification procedures used were fairly conducted, and no suggestion to identify petitioner occurred. Furthermore the trial itself at which petitioner was again identified, was held within three months after the robbery, at a time when there would be little or no opportunity for memories to fade.

Petitioner captiously seizes upon some asserted discrepancies to urge that the identifications were subject to doubt. When these discrepancies are analyzed, however, their *de minimis* nature is clearly appreciated. Thus, by reference to pages 33 to 35 of his brief, petitioner first asserts that, "There was no agreement from the testimony, on the robber's face." He then points to purported discrepancies concerning the descriptions given about the scar,

the mustache, and the hair underneath petitioner's lower lip. Nevertheless, at the trial five of the witnesses testified that they saw a scar on petitioner's face (Wong, Jow, Perry, Griffith, and Pauletich); and four testified that they saw the hairline mustache on petitioner's face (Wong, Jow, Perry, and Jones). While only two of the witnesses (Jow and Pauletich) apparently saw the few hairs underneath petitioner's lower lip, that is scarcely surprising if defendant's Exhibit A, is an accurate reflection of what he looked like at the time (see supra, pp. 1-8, 11-15).

Continuing on, at pages 35-37 of his brief, petitioner contends that there was "no agreement on the robber's clothing." Thus, despite the fact that all the witnesses agreed that petitioner was wearing a hat and coat, their identification is questioned because they describe the hat in various ways as, for example, "dark" or "oxford gray or brown," or, similarly for describing the outer garment as a "sports-type coat" or "sports coat" or "sports jacket." In similar vein the witnesses are faulted either for not being able to remember or describe the shirt, or for being able to describe it only as "yellowish" or "yellow" with "flowers" or "dots." The utter insignificance of such minor discrepancies as these seems clear. Indeed, if their testimony had been too "pat" it would be questioned.

Moreover, apart from the eyewitness testimony itself, the record establishes a number of corroborating factors. Thus, Roger Wong who hit the robber on the right hand with his gun, later saw a black spot on petitioner's right hand after he had identified him in the lineup. William Pauletich's mother gave the robber 30 to 40 $1 bills, and 31 $1 bills were later found on petitioner's person. Similarly, when Officer Nielsen asked him about the gun, petitioner replied, "I didn't have a gun. If I had one, I would probably

have killed somebody tonight. Guns make me very nervous." (A. 244).

In reaching its verdict the jury would have considered, of course, the defense put forward by the petitioner. But this defense can only be classified as weak at best. Thus, two of the witnesses' testimony was clearly insignificant (Sarah Cunningham and Thelma O'Hara), while the other witnesses were incorrect or confused about dates.

When all of the evidence before the jury is considered therefore it seems clear beyond a reasonable doubt that neither the comment nor the instruction could have contributed to petitioner's conviction. Under these circumstances therefore the Court of Appeal properly concluded that the comments were harmless beyond a reasonable doubt.

III. Petitioner May Not Now Raise Any Alleged Error Regarding the Use at Trial of His Silence in Face of Accusations.

Petitioner contends that it was error to use petitioner's silence in the face of accusations as evidence of guilt. However, there are two separate and independent grounds why this contention is not properly before this Court.

A. PETITIONER CANNOT RAISE A QUESTION WHICH WAS NOT CONTAINED IN THE PETITION FOR CERTIORARI.

In his petition for certiorari the only question presented by petitioner was whether the Court of Appeal had carried out the mandate of this Court in applying the *Chapman* standard. The petitioner later filed "an application for a writ of habeas corpus as a supplement to the application for a writ of certiorari." The question presented in that document was whether the trial court had lost jurisdiction by failing to protect petitioner's constitutional rights. Petitioner argued (p. 7) that since the District Court of Appeal

found that the trial court violated petitioner's constitutional rights by commenting and instructing on defendant's failure to testify, the trial court by failing to protect petitioner's constitutional rights lost jurisdiction to proceed to judgment. Thus, it is clear that the question of the use of petitioner's silence, in the face of accusation, as evidence of guilt was not raised in the questions presented.

Supreme Court Rule 23(1)(c) provides that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." The rule has been uniformly invoked when the petitioner's brief presents questions not raised in the petition. *Namet v. United States,* 373 U.S. 179, 190 (1963); *Phillips Co. v. Dumas School Dist.,* 361 U.S. 376, n. 12 at 387 (1960); *Carpenters' Union v. Labor Board,* 357 U.S. 93, n. 1 at 96 (1958); *Lawn v. United States,* 355 U.S. 339, n. 16 at 363 (1958); *Irvine v. California,* 347 U.S. 128, 129 (1954).

Petitioner attempts to evade the requirements of Rule 23(1)(c) by claiming that the question was raised in the "Statement of the Case" portion of his "application for a writ of habeas corpus as a supplement to the application for a writ of certiorari" (p. 6). Preceding the questions presented petitioner set forth a statement of the case which sets forth a variety of trial court proceedings including the statement that the trial court instructed on admissions by silence and that the district attorney commented thereon.

Certainly a petitioner cannot be permitted to raise various claims of error merely by giving a detailed statement of the case especially when the question raised was limited to the question of the *Griffin* error and the *Chapman* application. Such a practice conforms neither to the letter nor the spirit of Rule 23. A petitioner must be limited to those issues arising out of the questions presented in his petition, as those questions are framed through the arguments made

in support of that petition under Rule 23(1)(h). In *Irvine v. California,* 347 U.S. 128, 129 (1954), this Court declared, "We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition . . . ." Since petitioner now attempts the same maneuver condemned in *Irvine,* he should be similarly limited to those questions actually raised in his petition for certiorari and this Court should decline consideration of the question of the use of defendant's silence in the face of accusation.

B. THIS COURT'S RULING IN MIRANDA THAT A DEFENDANT'S SILENCE IN THE FACE OF ACCUSATION MAY NOT BE USED AT TRIAL CANNOT BE RETROACTIVELY APPLIED TO THE INSTANT CASE.

Petitioner contends that it was error to use petitioner's silence in the face of accusations as adoptive admissions of guilt at his trial. This Court has already held that the prosecution may not use the fact that a defendant stood mute in the face of accusation. Footnote 37, at page 468 of *Miranda v. Arizona,* 384 U.S. 436 (1966), reads in part as follows:

> "In accord with our decision today it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. Griffin v California, 380 US 609, 14 L ed 2d 106, 85 S Ct 1229 (1965); Malloy v Hogan, 378 US 1, 8, 12 L ed 2d 653, 659, 84 S Ct 1489 (1964); Comment, 31 U Chi L Rev 556 (1964); Developments in the Law—Confessions, 79 Harv L Rev 935, 1041-1044 (1966). See also Bram v United States, 168 US 532, 562, 42 L ed 568, 580, 18 S Ct 183 (1897)."

It is apparent by a reference to the relevant text of the *Miranda* opinion which discusses the coercive evils of interrogation of a suspect, including the dilemma posed

by silence in the face of accusations and also the precise language that the footnote is considered a part of the holding in *Miranda.*

In *Johnson v. New Jersey,* this Court expressly declared that "*Miranda* applies only to cases in which the trial began after the date of our decision one week ago." 384 U.S. 719, 721 (1966). Petitioner's trial commenced on July 30, 1962 almost four years prior to June 13, 1966, the date of the *Miranda* decision.

In a *per curiam* opinion the Ninth Circuit Court of Appeals specifically held that *Johnson v. New Jersey* is applicable to this Court's ruling that the prosecution may not use at trial the fact that defendant stood mute in the face of an accusation and that therefore such ruling could not be retroactively applied to trials commenced prior to the date of the *Miranda* opinion. *Wilson v. Madigan,* 389 F.2d 97 (9th Cir. 1968).

It is therefore submitted that *Johnson v. New Jersey,* 384 U.S. 719 (1966), is applicable and that this Court's holding in *Miranda,* that is, that the silence of a defendant in the face of accusations cannot be used against him, is not retroactive to the instant case.

IV. Neither the Lineup nor the Other Identification Procedures Used Were So Suggestive or Conducive to Irreparable Mistaken Identification as to Constitute a Denial of Due Process.

Petitioner asserts that due process was violated on three occasions by the pretrial identification procedures used either by the police or the Office of the District Attorney, and that these procedures tainted the later identifications made at trial.

A. PETITIONER CANNOT PRESENT A QUESTION WHICH WAS NOT RAISED IN THE PETITION FOR WRIT OF CERTIORARI.

In argument III, page 39, respondent set forth Supreme Court Rule 23(1) (c) and the decisions of this Court which

state that only questions set forth in the petition or fairly comprised therein will be considered by this Court. The instant petition does not raise nor even allude to the question of the fairness of lineup procedures. Since the question was not raised in the petition of this Court should decline consideration of that issue.

B. THE LINEUP AND THE OTHER IDENTIFICATION PROCEDURES DID NOT CONSTITUTE A DENIAL OF DUE PROCESS.

Seeking to bring this case within the scope of several recent decisions of this Court, petitioner contends that due process was violated: (1) when he was taken back to Linden Liquors the night of the robbery where Mr. Pauletich identified him as the robber; (2) when he was placed in the lineup the next morning; and (3) when photographs of him were shown to three of the witnesses after the lineup but before the trial. A review of the record demonstrates that each is totally without merit and that petitioner cannot prevail on a due process claim.

In making each of these contentions, of course, petitioner seeks to bring his case within that line of cases beginning with *United States v. Wade,* 388 U.S. 218 (1967), holding that a post-indictment lineup is a critical stage of the prosecution at which a defendant is entitled to the aid of counsel. See also *Gilbert v. California,* 388 U.S. 263 (1967). While petitioner does not here claim a right to counsel here in view of *Stovall v. Denno,* 388 U.S. 293 (1967), limiting the *Wade* and *Gilbert* rules to future cases arising after the date of these decisions, June 12, 1967, apparently he does claim that the due process standards set forth in *Stovall* are applicable here. Thus, in *Stovall v. Denno, supra,* which involved a collateral attack on a post-indictment but pretrial identification procedure used, the Court in setting forth the test to be applied to lineup cases tried before *Wade,* said:

> "We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. Palmer v. Peyton, 359 F.2d 199. . . . However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. . . ." (388 U.S. at pages 301-302 footnote omitted.)

That the question of unfairness depends upon the totality of circumstances presented has been reaffirmed in *Simmons v. United States,* 390 U.S. 377 (1968), (dealing with the pretrial use of photographs). Petitioner must establish that the confrontation resulted in such unfairness and that under the circumstances it infringed upon his right to due process of law. *Stovall v. Denno,* 383 U.S. 293, 299 (1967). Petitioner cannot demonstrate here, however, that any of the pretrial identification procedures used, "resulted in such unfairness that it infringed his right to due process of law," *Stovall v. Denno, supra,* 388 U.S. 293, 299. We deal below with each contention seriatim.

1. The Identification by Pauletich.

The record shows that immediately after each robbery or attempted robbery, the police were called and descriptions of the robber given. These descriptions were conveyed to Officer Nielsen and led him to believe that the same person was involved in all three liquor store robberies. These descriptions coupled with petitioner's statement to Coatsie Smith that "I might want to hold you up" led to

his arrest at Sobek's Liquors (A 228). Officer Nielsen then took petitioner to the closest store (Pauletich's) to determine if petitioner was in fact the one who had committed the robberies. By taking him there, Officer Nielsen could determine if he had arrested the right man or if, on the contrary, petitioner should be released and the search continued.

Once inside the store, the police did not indicate or suggest to Pauletich that he should identify the petitioner as the robber. Pauletich did not converse with the police officers prior to his identification (A 200). The officers asked Pauletich if petitioner was the robber. After coming closer to the petitioner "so I could see better," Pauletich told the officers "that is the man." (A 199).

Petitioner contends that the identification by Pauletich was unfair because he was the only suspect present. Although a situation in which a suspect is placed in the position of being the only person to be identified is potentially unfair (*United States v. Wade,* 388 U.S. 218 (1967); *Gilbert v. California,* 388 U.S. 263, 302 (1967)), one in which the "totality of the circumstances surrounding" the confrontation demonstrates that the identification was valid provides no denial of due process. In *Stovall* this Court upheld a single confrontation because the condition of the victim witness made an immediate confrontation advisable.

This case presents another situation where a single confrontation was warranted. Prompt identification of a suspect who has been apprehended close to the time and place of the offense assists the police in not only finding the culprit but also helps to protect the innocent. The propriety of an immediate confrontation with the victim has been the subject of recent judicial comment.

> "No principle of justice rooted in our traditions and conscience as a people is offended by the course which

was followed in this case. It would be ridiculous to contend that under the circumstances the police should have gone out and brought in a number of persons, placed appellant with them and then said in effect to the victim 'Which one participated in the burglary?' We are not persuaded that we should declare a confrontation objectionable solely because the suspect was viewed with a policeman by the victim. To do so would cancel a police investigative tool which if effectively used aids in quickly exonerating the innocent and discovering the guilty," *People v. Romero,* 263 A.C.A. 651, 655, 69 Cal.Rptr. 748 (1968).

Petitioner contends that "the showup produced an identification of a man who did not fit the description of the robber Pauletich had given the investigating officers minutes before." (Petitioner's Brief, p. 80). The record refutes this contention.

Pauletich told the officers the robber "was a fellow about my size" which petitioner on cross-examination established as 5'8" tall and 160-165 pounds (A 195, 198). In this connection petitioner states that the robber of the Pauletich store was described to the reporting officers as 5'9" to 5'10" tall, 170 pounds, and 40-50 years old (Petitioner's Brief, p. 11). Petitioner "testified" without benefit of oath or cross-examination that he was 5'10" tall and weighed 180 pounds (A 275). Certainly a possible two-inch difference in height and 15 pounds weight difference is not significant. When the police arrived at Pauletich's store immediately after the third robbery, they needed an immediate general description in an effort to apprehend the robber who was still engaged in a one-man crime wave. As Pauletich stated in his testimony the police at that time "wanted a more or less closer description, whether he was six-foot or whether he was five-six." (A 198).

Although he did not notice a hairline moustache, Pauletich told the officers that the robber had a scar on his face (A 195-196), that the robber wore a sportcoat (A 194-198), a hat and a floral shirt (A 198), and that he was unable to see the robber's trousers because the counter blocked his view (A 195). Thus the characteristics of the petitioner were remarkably similar to Pauletich's observations regarding the robber.

Petitioner criticizes the following factors as being unduly suggestive: (1) The suspect and the victim were of a different race; (2) the identification occurred at night; (3) the victim of the robbery was emotionally involved (A 79). If these factors are impermissibly suggestive, then it means that a person of one race may not validly identify a suspect of another race, that a victim may not validly identify a suspect (apparently only disinterested automatons may qualify), and that valid identifications may occur only in broad daylight. Thus petitioner's contention would nearly nullify all identification because of factors occurring at the time of the crime. Certainly the due process clause of the Constitution cannot be interpreted to prevent all identifications of suspects.

The very promptitude with which the police acted promoted reliability. Within a half-hour Pauletich saw Banks at his store and positively identified him as the robber. The robber's appearance was fresh in the victim's mind. Pauletich had sufficient opportunity to observe petitioner in a well-lighted store during the robbery. Certainly the fact that petitioner was wearing clothes similar to the clothes the robber was wearing one-half hour earlier cannot be deemed unfair unless the police are to be required to keep a wardrobe in the squad car. Further, unlike the lineup described in *Gilbert v. California,* 388 U.S. 263, 270, fn. 2,

petitioner was not compelled to put on certain articles of clothing. Rather he was viewed in the clothing he was wearing at the time of his arrest.

Finally, petitioner contends that the identification by Pauletich was a wholly unnecessary procedure (Petitioner's Brief, p. 80). In the instant case the immediate identification by Pauletich was necessary in order that the police could determine if the suspect was the robber. If not they could immediately continue their search for the robber and perhaps prevent the commission of additional robberies.

Thus, the California Supreme Court has encouraged police officers promptly to return the suspect to the scene of the crime for identification purposes. *People v. Mickelson,* 59 Cal.2d 448, 454, 30 Cal.Rptr. 18 (1963).

In this regard the Court of Appeals for the District of Columbia has ruled:

> "Here was a confrontation proximate to the scene and time of the offense as well as the apprehension, where the observers and actors were limited to those that were in fact present at the scene and time of the offense and the chase. Here were circumstances of fresh identification, elements that if anything promote fairness, by assuring reliability, and are not inherently a denial of fairness. * * * [We] do not consider a prompt identification of a suspect close to the time and place of an offense to diverge from the rudiments of fair play that govern the due balance of pertinent interests that suspects be treated fairly while the state pursues its responsibility of apprehending criminals." *Wise v. United States,* 383 F.2d 206, 209-210 (D.C. Cir.), *cert. denied,* 390 U.S. 964 (1967). See also *Kennedy v. United States,* 353 F.2d 462 (D.C. Cir. 1965).

Thus it is clear that considering the totality of circumstances surrounding the confrontation, the identification by Pauletich was proper and fair.

2. The Lineup.

Petitioner's further contention that the lineup was conducted in an unduly suggestive manner is similarly devoid of merit. Indeed, viewed "in the light of the totality of surrounding circumstances," *Stovall v. Denno, supra,* the claim is untenable.

The record discloses that petitioner was placed in a lineup the morning of his arrest and following his identification by Mr. Pauletich. Since he fit the description of the robber of the other two stores, Wong and Jow from Vince's Liquors, and Perry, Griffith, and Jones from Three Point Liquors were asked to view a lineup. In asking the victims to come to the station to view the lineup, the police in no way suggested that petitioner was the suspect. Wong, for example, specifically was told that there might be a couple of lineups (A. 92). Thus this case at the outset does not present the type of suggestive procedure described in *United States v. Wade, supra,* 233 wherein the victim sees only the suspect or the suspect is otherwise pointed out.

In the lineup room the witnesses were told to go to the back of the room and "no talking" (A. 139). Each of the witnesses went one at a time to view the lineup, and no one heard what, if any, identification the others made in the viewing room. Perry happened to be the first to view the lineup, but there is nothing to suggest, as petitioner does, that it was because he was "impatient" much less that this "impatience" was "communicated" to the other witnesses. Similarly, the record in no way suggests "hostility."

The lineup itself was held in an area outside the viewing room and was viewed by looking through glass. Consequently, there could be nothing suggestive in the police telling the witnesses to look straight out through the glass (Petitioner's Brief 83). Similarly, since the entire lineup could

be viewed by looking through the glass, there could be nothing suggestive in the fact that petitioner stood in the middle rather than at some other place. The lack of suggestion is further established by the fact that on either side of petitioner stood two other Negro males, or a total of five Negro males, all of similar height and weight. None of the participants were "grossly dissimilar" as stated in *United States v. Wade, supra,* 233, nor was the lineup in any way similar to that recently condemned in *People v. Caruso* 68 Cal.2d 183, 436 P.2d 336 (1968), wherein the defendant was 6 feet 1 inch, weighed 238, was of Italian descent with dark complexion and dark wavy hair, while all the other members resembled him neither in size, complexion or hair.

While from Defendant's Exhibit "B" petitioner seizes upon the age of the participants as a distinguishing and suggestive feature, urging that the others were younger (Petitioner's Brief 83-84), an examination of the photograph of the lineup participants reveals that apart from the man on the far left, all of the men were of approximately the same age. Furthermore, it otherwise appears from the record that petitioner's appearance in age may, in fact, have been deceptive. Thus, at one point prior to trial, when petitioner said he was 48, the judge expressed surprise and exclaimed, "By George, you are a young looking man for 48" (R. 42). While Wong apparently always considered petitioner to be 50, he also thought a man standing close to the wall was 50, too (A. 102).

Of the clothing worn by the participants, three wore jackets. Petitioner, of course, wore the clothing that he had on when arrested and about which there was nothing unusual. This is not a case therefore where petitioner was required to put on distinctive clothing.

Similarly, while Defendant's Exhibit "B" shows only petitioner standing with his hat in front of him, during the

lineup itself it appears that the others wore hats, too. Thus, Wong, for example, testified that at first all of the men were without hats, and he then recognized petitioner. However, he wanted to make sure of his identification, and at his request all of the men wore hats (A. 60, 69-72). When Jones first saw petitioner he was without a hat, but then because he, too, "wanted to identify him just like he was when I saw him coming out of the store," petitioner wore a hat (A. 183). When Griffith first saw the lineup all the men were bareheaded. Petitioner then put on a hat (A. 170). At the lineup, of course, all the witnesses made a positive identification of petitioner (see supra, 9-11).

In the totality of the surrounding circumstances, therefore, there was nothing suggestive about the way in which the lineup was conducted or which would lead to a mistaken identification. None of the suggestive procedures set forth in *Wade,* for example, were present. Thus, apart from the other points already noted, this is not a case when all the members in the lineup but the suspect was known to the witnesses, or a case where the suspect was pointed out before or during the lineup, or where, for example, the participants were asked to put on clothing which fit only the suspect. *United States v. Wade, supra,* 233.

Assuming arguendo, however, that there was some way in which the lineup was conducted that fell short of due process—a claim which we believe cannot be maintained—there is no showing that the lineup "tainted" the later identification made at trial. Thus, in considering in order the factors outlined in *Wade, supra,* 241, as noted throughout this brief, each of the witnesses had ample opportunity to view the petitioner at close distance and in a well lighted store.

Similarly, there were no discrepancies between the pre-lineup descriptions given and the identifications made at

the trial. While petitioner refers to a number of police reports which the evidence clearly shows were never shown to or signed by the witnesses, these reports in fact substantiate the identifications made by the witnesses. The weakness of petitioner's case in this respect is demonstrated by the examples of alleged discrepancies he lists. Thus, for example, he notes that the report for the robbery of Perry listed a "small scar left side of mouth" as contrasted with "the large, pronounced scar above petitioner's lip"—a matter which clearly is one of opinion. In similar vein petitioner says the report lists the robber's hat as "brown" but petitioner's hat was black (Petitioner's Brief 86). The *de minimis* value of this kind of discrepancy is readily apparent. If one continues on, the greatest discrepancy asserted is between Perry's description of petitioner as "cool" whereas the unsigned report said "nervous." However, cool is the way in which Perry described petitioner at trial and the preliminary hearing.

Indeed, when the consistencies between the reports and the testimony are considered, the comparison is striking. At no time did the witnesses describe petitioner other than what he was, nor did they identify any other person to be the robber. There were no pictures shown to the witnesses prior to the lineup, nor was there any failure to identify the petitioner on a prior occasion. Thus, this case is totally unlike the lineup described in n.16 of this Court's opinion in *Bumper v. State of North Carolina,* 391 U.S. 543 (1968), where the witnesses initially identified someone who was not the petitioner.

Indeed, when all the evidence is considered it must be concluded that petitioner was not deprived of due process in the conduct of the lineup, nor was there a mistaken identification made. The witnesses consistently identified

the petitioner from the inception, continuing through the preliminary hearing and the trial itself. If doubt existed as to petitioner's identification, it was not in the minds of the witnesses.

3. The Showing of the Photographs.

Finally petitioner contends that the showing of a photograph to each of three witnesses, Jow, Griffith and Jones, prior to trial constituted a denial of due process. However, the witnesses' observation of his photograph must be examined in light of the prior identification of petitioner by each of the three witnesses.

Thus, Jow was present at the lineup and informed the officers "that is the fellow out there. He looks like that is the fellow." (A 116). That Banks "is the very person. He looks exactly like the fellow that came and robbed the store." (A 117). But he was not "positively sure, because the light glares on the glass and that affects my vision." (A 116).

Jow testified that a police officer showed him a picture of petitioner at the time he served a subpoena a few weeks before trial (A 117, 122). After stating that the picture refreshed his memory (A 118), he testified that the picture did not help make up his mind in identifying the suspect (A 120). He further testified that the photograph "does not help me. It don't have to be refreshed. When a person points a gun at you at about three feet, you will remember it" (A 124). When asked if he would have been so sure in his identification without the photograph Jow replied, "After I see you, I am positively sure." (A 126).

Mr. George Griffith identified Banks as the robber of the Three-Point Liquor Store at the time of the lineup. Griffith testified that he looked at the five men in the lineup and, referring to Banks, stated: "That is the guy right there."

(A 170). After Banks put his hat on Griffith repeated his identification (A 170).

On the day trial was originally scheduled to commence (July 16th) Griffith appeared in the district attorney's office pursuant to a subpoena and was shown a photograph of Banks (A 173). At trial when petitioner asked if the photograph refreshed his memory of the robber Griffith replied, "No, I seen your face. No, it didn't refresh my memory as to no robbery. I just know it was you when he showed me the picture." (A 174).

Mr. Robert Jones also identified Banks as the robber of the Three-Point Liquor Store at the lineup held on May 5, 1962 (A 183). At the lineup Jones told the officer he would be able to make a better identification with a hat on because that was the way he had seen the robber (A 186). After the officer had the suspects put their hats on Jones identified Banks as the robber (A 186).

Griffith was shown a photograph of Banks two weeks prior to trial at the time trial was then set to commence (A 181). When asked about the photograph Griffith replied, "No, it didn't refresh my recollection, not at all." (A 187). He further testified that he would have been able to identify Banks without the aid of the photograph (A 187).

Thus, the record demonstrates that each of the witnesses shown petitioner's photograph had previously made an identification of petitioner long before they even saw his photograph. Thus this Court's holding in *Simmons v. United States,* 390 U.S. 377 (1968), has no bearing on the instant case. In that case after discussing the advantages and dangers of initial identification by photographs this Court applied the standard set forth in *Stovall,* that is, whether the photographic identification procedure was so impermissibly suggestive as to give rise of a very substan-

tial likelihood of irreparable misidentification. In *Simmons* this Court was concerned with "the hazards of *initial identification* by photograph." (Emphasis added.) *Id.* at 384. Here the showing of the photograph was not the initial identification of petitioner but rather occurred months after the lineup when each of the witnesses had identified the petitioner as the robber of the respective stores.

Furthermore, even where the initial identification is by photograph this Court determined in *Simmons* that such procedure did not violate due process because of certain factors there present including the fact that the robbery took place in a well-lighted bank, that the robbers wore no mask, that the witnesses were able to plainly see the person identified as the robber for periods up to five minutes, and the fact that the witnesses, notwithstanding vigorous cross-examination, entertained no doubt about the validity of their identifications. In the present case the robberies took place in well-lighted stores, the robber exposed his features without even wearing a mask or dark glasses to hide his features, the witnesses had an adequate opportunity to view the robber, and at trial none of the witnesses displayed any doubt about their respective identifications of Banks.

Finally, the record is clear and convincing that the in-court identification by each of the three witnesses was not based on their view of the photograph but rather was based solely on their independent observation of petitioner at the scenes of the robberies. Thus, each witness stated that the photograph did not help in identifying the suspect but rather that the identification was based on recollections at the time of the robbery.

For all of the aforementioned reasons it is submitted that the display of petitioner's photograph to the three witnesses at the time they were served subpoenas did not constitute a denial of due process.

V. Petitioner Was Not Denied His Right to Counsel at Trial or on Appeal.

A. PETITIONER CANNOT PRESENT A QUESTION WHICH WAS NOT RAISED IN THE PETITION FOR CERTIORARI.

In Argument III, page 39, respondent set forth Supreme Court Rule 23(1)(c) and the uniform case law which holds that only questions set forth in the petition or fairly comprised therein will be considered by this Court. The instant petition does not raise nor even allude to the question of denial of counsel at trial. Since the question was not raised in the petition this Court should decline consideration of the question of denial of counsel at trial.

B. PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL AT TRIAL.

Petitioner contends that he was denied the right to counsel at the trial court level. In order to discuss this contention properly it is necessary to review the circumstances concerning counsel. This contention was not raised in his petition for certiorari. Therefore, respondent did not designate for including in the appendix those portions of the record concerning petitioner's waiver of counsel. It is therefore necessary to refer to and quote extensive portions of the record dealing with the waiver of counsel in order to reply to this contention.

At the preliminary hearing the petitioner was represented by the public defender and was held to answer for trial (RT 32). Petitioner thereafter appeared in Superior Court on five separate occasions between June 7 and July 10, 1962, for arraignment and various motions and on each occasion was represented by the public defender (RT 2-12). On July 16, 1962, the day on which the case had been set for trial, the petitioner stated, "I would like to have this Honorable Court appoint counsel other than the public defender." (RT 15:6-7). The court immediately informed petitioner that he

had a right to appointed counsel but that this right did not include the right to choose whatever counsel he wanted. The court further stated that petitioner did not have to have the public defender if he did not want him but was not entitled to other counsel if the public defender was not disqualified for any reason. Petitioner replied:

> "THE DEFENDANT: One reason, your Honor, I asked for other counsel, and it is my desire and wish that I think I should be entitled to have other counsel, is, according to the records of the public defender's offices, they have lost an unduly large number of cases where the District Attorney's office has been involved." (RT 15:20-25).

The trial court informed petitioner that the public defender's office was very able and that their record was similar to private attorneys engaged in similar work:

> "THE DEFENDANT: Well, then, if that is the case, then I'm being denied on this particular motion, I think I will just go in court and try to represent myself to the best of my ability and without counsel.
>
> THE COURT: You don't wish to be represented by the Public Defender?
>
> THE DEFENDANT: That's right, and I would like the record to show that this is not an intelligent waiver of counsel as required by the Superme [sic] Court ruling.
>
> MR. PULICH: Wait a minute. 'It is not an intelligent waiver of counsel'?
>
> THE DEFENDANT: That's right.
>
> THE COURT: Well, you are entitled to select your own counsel, and there is no reason to replace the Public Defender with private counsel." (RT 16:19-17:7).

After determining that the petitioner was not offering to obtain his own counsel but rather wanted the public defender replaced with court-appointed counsel, the trial court denied the motion.

Thereafter a discussion ensued between the trial court and the public defender concerning the propriety of the public defender assisting the petitioner. The court then granted the petitioner's motion "that the Public Defender be relieved as his counsel and the defendant stand in pro per, . . . With the notation that the Court has requested and directed the Public Defender to have a member of his office present to consult with and advise the defendant to the extent that the defendant wishes." (RT 19:15-23).

On July 17, petitioner entered motions for discovery regarding prosecution witnesses and also motions to obtain certain law books. Trial was continued until July 18 (RT 20-22). On July 18, trial was continued until July 23 (RT 23-24) and on that date was continued until July 25 (RT 25-26). On July 25 the trial judge transferred the case to Department 3 for trial. In that Department the petitioner again claimed that the public defender's office was not qualified (RT 32:26-33:6). The judge informed the petitioner that the public defender's office was both efficient and dedicated and enjoyed a good reputation. When the court asked whether he had sufficient funds to retain a private attorney, petitioner replied:

> "THE DEFENDANT: No, I doesn't. You see, I made this also a considerable issue over in the other court. You see, the ruling I got from the Supreme Court, a defendant is entitled to counsel and I think in some cases other than the Public Defender and there is a number of cases from the U. S. Supreme Court says someone can waive counsel and frequently I have noted that in the record, I did not make a waiver of counsel." (RT 35:7-13).

The trial judge then advised the petitioner that it would be in his best interests to be represented by the public defender and further advised him of the difficulties involved

in a defendant's presenting his own case (RT 35:14-39:23). When the judge asked him why he insisted on representing himself, petitioner replied:

> "THE DEFENDANT: Because the Supreme Court in Wage vs. Indiana and Closky vs. New York, and those cases mostly involved counsel and the Supreme Court expressly states I am entitled, just as the Supreme Court expressly provides a man is entitled to counsel." (RT 40:6-10).

When asked to choose between proceeding on his own behalf or being represented by the public defender, petitioner replied:

> "THE DEFENDANT: Well, I just prefer to try to plead my own cause to the best of my ability, whether it comes up to the standard or par required by law." (RT 41:4-6).

After an extended discussion of the matter of counsel with petitioner, the trial court concluded:

> "You impress me as being a person of intellect even though I appreciate the fact you have been in school only through the 6th grade, but evidently you have had contact with people, you speak well, you have acquired experience unquestionably in relation to court matters, to the point that if literally you insist on representing yourself I cannot prevent you nor shall I. But on the other hand, I urge you to consider it, urge you to accept the services of the Public Defender and a service to yourself. What is your last word on the subject?
>
> "THE DEFENDANT: Well, I still insist on defending myself. I would rather the case go that way than go on the services of counsel. This way, the case itself as it stands now, and when it gets before a higher court if I am convicted, which I don't deny, I don't believe, because of the higher percentage of the State's Attorney of Alameda have; of course, it is possible. In case I do get convicted, it will go on appeal.

THE COURT: You understand, of course, you would still have the right of appeal whether you are represented by an attorney or not?

THE DEFENDANT: I understand.

THE COURT: Your rights are accorded to you, you understand that?

THE DEFENDANT: I understand. It looks much better going up without counsel.

THE COURT: In what way does it look better to you?

THE DEFENDANT: Because I do say that within California law there is another way you could appoint counsel other than the Public Defender's office. I do believe that. I haven't run across it in the books, but I think there is a couple of books I still haven't seen on this particular point." (RT 46:18-47:22).

The petitioner then peremptorily disqualified the judge in Department 3 from presiding over the trial (RT 48:21-51:5).

On July 30 the case had been referred back to the original trial judge. When the trial judge advised petitioner that the public defender could be reappointed, petitioner replied that "I do have a right in having counsel other than the Public Defender . . ." (RT 53:15-16). After another extended colloquy with the judge concerning the public defender and private counsel, petitioner replied:

"THE DEFENDANT: Well, then, just like I said before, if the Court won't appoint nobody else other than the Public Defender, I just as soon go to trial without a Public Defender." (RT 54:11-13).

When the judge indicated that the public defender should remain in the courtroom and assist the petitioner as an advisor, petitioner stated:

"THE DEFENDANT: I would rather for him not to participate in the case at all." (RT 54:25-26).

The court directed that the public defender remain in the courtroom to listen and be familiar with the case and be available to the petitioner upon his request (RT 56).

Finally, petitioner's conduct at the trial was very adept, prompting the court to comment at its conclusion:

> "THE COURT: Mr. Banks, before sentencing you, I want to say that you did an excellent job in presenting your case.
>
> THE DEFENDANT: Thank you, your Honor.
>
> THE COURT: And I would say it was about as good as the average young attorney does on his first few cases.
>
> THE DEFENDANT: Thank you, your Honor." (RT 637: 21-26).

The court's duty, when it appeared that defendant was indigent, was to protect his constitutional right to assistance of counsel. *Gideon v. Wainwright,* 372 U.S. 335 (1963). In the instant case this was done upon the petitioner's appearance in municipal court and continued during his initial appearances in the trial court. However, the right to counsel having been observed, it may not be manipulated by the defendant to thwart the orderly process of the due administration of justice and used as a tactic to delay trials. *United States v. Llanes,* 374 F.2d 712 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967).

Petitioner saw fit to dismiss the public defender with full knowledge that he would have to undertake the defense himself. The trial judge was clear, explicit and firm in his explanation to the petitioner of all of the dangers inherent in self-representation.

Petitioner's objections to the public defender were unrealistic and without cause. Certainly the objection offered by petitioner, that is, the allegation that the public defender's office had lost many cases where the district attorney's

office had been involved, presented no adequate ground for the appointment of another attorney.

Petitioner apparently also claims for the first time in his brief that his alleged lack of confidence in the public defender was based upon the public defender's failure to vigorously press a motion for separate trials for each of the charged robberies (Petitioner's Brief, p. 101). Not only was this reason not even mentioned to the trial court but furthermore it is an entirely inadequate basis. California Penal Code section 954 provides that an indictment may charge two or more different offenses connected together in their commission or two or more different offenses of the same class of offenses under separate counts. The three charged robberies were not only offenses of the same class but also were connected together in their commission having all been committed in the same geographical area within a period of one hour.

The trial judge's directive to either accept the public defender or proceed alone was entirely proper under all the circumstances confronting the court and the petitioner. A defendant who dismisses counsel without good cause is not entitled to the appointment of new counsel. *United States v. Llanes,* 374 F.2d 712 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967); *United States v. Burkeen,* 355 F.2d 241 (6th Cir.), *cert. denied, sub nom., Matlock v. United States,* 384 U.S. 957 (1966); *United States v. Abbamonte,* 348 F.2d 700 (2d Cir. 1965). Banks has failed to prove that his objections to the public defender were valid. His decision to dismiss counsel and proceed alone, therefore, constituted a knowing and voluntary waiver of his right to legal representation. *Johnson v. United States,* 318 F.2d 855 (8th Cir. 1963).

Throughout the extensive discussions in this case the trial court repeatedly urged petitioner not to defend in propria persona but rather to accept the court's offer to

appoint the public defender (see RT 35, 37, 38, 40, 45, 53). The reasons tendered by the petitioner in the record were not only patently frivolous but also highly indicative of his real purpose in refusing the court's offer of counsel.

During the colloquy with the trial judge, following his statement that he would represent himself without counsel, petitioner stated for the record that "this is not an intelligent waiver of counsel as required by the Supreme Court ruling." (RT 16). And at a later point, after further urging by the court to accept the public defender, petitioner stated that if he was convicted he would appeal and, "it looks much better going up without counsel." (RT 47). We submit that the plain inference to be drawn from this record is that, in light of his tenuous defense, petitioner was laying a foundation before the case was even tried for a contention on appeal. Petitioner believed that his chances of reversal on appeal would be greatly enhanced if he represented himself. The right to counsel may not be used to play "a cat and mouse game with the court." *Leino v. United States,* 338 F.2d 154, 156 (10th Cir. 1964).

The actions of the petitioner and the argument he advances in his brief make reference to *United States v. Plattner,* 330 F.2d 271, 276 (2d Cir. 1964), appropriate. It was there pointed out:

> "Moreover, one of the by-products of the recent developments in the law relative to the assignment of counsel in all but a few of the cases of indigent defendants has been an awareness by the prison population and a very considerable number of persons who may in the course of time add to the prison population, of the possibility of manipulating the basic rule in a fashion such as to produce a record of confusion on the subject, and to give the accused the opportunity to to claim a reversal in the event of conviction on the

> ground that his rights under the Fifth and Sixth Amendments had been infringed. The ingenuity of these individuals, especially the recidivists, betokens a high if misdirected intelligence." *Id.* at 276.

This Court should not condone the petitioner's deliberate tactic to confuse and manipulate the record concerning a defendant's right to counsel.

It should further be observed that Banks had the right to represent himself and to insist upon the discharge of his court appointed counsel. *United States v. Johnson,* 333 F.2d 1004 (6th Cir. 1964). The Constitution does not "require that under all circumstances counsel be forced upon a defendant." *Carter v. Illinois,* 329 U.S. 173, 174-175 (1946); *Adams v. U.S. ex rel. McCann,* 317 U.S. 269, 275 (1942). As recently stated in *United States v. Denno,* 348 F.2d 12 (2d Cir. 1965):

> "[E]ven in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice 'with eyes open.'" *Id.* at 15.

The record in this case establishes that the trial judge was careful and thorough in explaining to Banks his right to counsel, and that Banks on his own volition made the deliberate choice to conduct his own defense.

Furthermore, although an accused person has the right either to appear in propria persona or to be represented by counsel, he has no right to a hybrid of the two rights. *Duke v. United States,* 255 F.2d 721 (9th Cir.), *cert. denied,* 357 U.S. 920 (1958); *Shelton v. United States,* 205 F.2d 806, 812 (5th Cir.), *cert. dismissed,* 346 U.S. 892 (1953), *motion denied,* 349 U.S. 943 (1955). Thus petitioner, having elected

to conduct his own defense, continued to have the assistance of counsel in an advisory capacity. Certainly, it cannot be said that under such circumstances petitioner was denied his right to counsel at trial.

C. PETITIONER WAS NOT DENIED COUNSEL ON APPEAL.

Petitioner contends that he was denied counsel on appeal when the Court of Appeal refused to appoint counsel at the time of the remands from this Court. This contention is premised on a series of misconceptions of the record.

The Court of Appeal did not refuse to appoint counsel on appeal in this case. Shortly after the record on appeal had been prepared the Court of Appeal appointed Robert M. Chefsky as counsel on appeal (A 315). Counsel thereafter filed a brief on behalf of appellant Banks and personally argued the case on behalf of Banks. The Court of Appeal affirmed the judgment of conviction (A 317-322).

After this Court remanded the case for further proceedings in light of *Griffin v. California,* 380 U.S. 609 (1965), the Court of Appeal sent a letter to both petitioner and his counsel advising petitioner that he was still represented by Mr. Chefsky on this appeal and that no different attorney would be appointed. After stating that the court would consider the impact of *Griffin* in deciding the matter the court informed petitioner and counsel that they could submit additional written arguments if they wished (A 328-329). Petitioner later filed a supplemental brief pro se. The Court of Appeal affirmed the judgment of conviction.

After this Court remanded this case for further proceedings in light of *Chapman v. California,* 386 U.S. 18 (1967), the Court of Appeal again sent a letter to petitioner and his counsel and informed counsel if he wished to file a supplemental brief he could do so (A 337). Petitioner later filed a supplemental brief pro se.

Thus the record reveals that the Court of Appeal did not refuse to appoint counsel on appeal. On the contrary the record shows that the Court of Appeal appointed counsel and counsel filed a brief and made an appearance to orally argue the case. In effect the petitioner is contending that the Court of Appeal refused to appoint a second or different counsel. A defendant for whom counsel has been appointed must accept such counsel absent a substantial reason for a substitution. *United States v. Llanes,* 374 F.2d 712 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967); *United States v. Burkeen,* 355 F.2d 241 (6th Cir.), *cert. denied sub nom., Matlock v. United States,* 384 U.S. 957 (1966).

In the instant case the petitioner offered the court only one reason as to why he was entitled to the appointment of a second counsel on appeal. That reason as stated in his letter to the court was because his appointed counsel on appeal failed to point out the *Griffin* constitutional error (A 327-328). In refusing to appoint a second counsel on appeal the Court of Appeal observed:

> "The case of Griffin v. California changed the law in the State of California and the Griffin case was decided after your judgment of conviction had been affirmed by this court. Mr. Chefsky could not have anticipated the Supreme Court's decision in Griffin v. California." (A 329:3-7).

This Court's later decision in *Tehan v. Shott,* 382 U.S. 406 (1966), was based on the premise that prior to *Griffin* the practice of commenting on the defendant's silence was well established. Petitioner may demand prescient counsel on appeal, the constitution does not. Thus, petitioner offered the court no substantial reason for the appointment of a second counsel on appeal. In the absence of such reason it is submitted that petitioner was not entitled to the appointment of a different counsel on appeal.

Petitioner now attempts to claim that Mr. Chefsky did not continue as his counsel on appeal during the remands. Petitioner bases this claim on a letter written by counsel to Banks shortly after the initial affirmance of this case by the Court of Appeal. However, it should be observed that this letter is not a part of the record before this Court. The letter is not in the files of the Court of Appeal nor was it transmitted to this Court by the Court of Appeal. Indeed, this letter, without authentication or verification, was presented to this Court as an exhibit attached to a supplement to the petition for writ of certiorari filed by the petitioner. Petitioner plainly is not entitled to cite and rely upon evidence which is not part of the certified record before this Court. *Lawn v. United States,* 355 U.S. 339 (1958); *McClellan v. Carland,* 217 U.S. 268 (1910). To the extent that petitioner's argument is based on alleged facts not in the record they are not before the Court. *United States v. Beard,* 381 F.2d 329 (6th Cir. 1967).

It should be observed that if petitioner did receive such a letter petitioner should have so advised the Court of Appeal. However, the petitioner chose not to do so. In view of his ingenious tactics to manipulate and confuse the record with regard to his right to counsel at trial petitioner may well have determined not to advise the Court of Appeal because it would "look much better going up" on certiorari.

Petitioner relies upon this Court's decisions in *Douglas v. California,* 372 U.S. 353 (1963), and *Anders v. California,* 386 U.S. 738 (1967), in support of his contention that he was refused counsel on appeal. Neither decision is applicable to the instant case.

In *Douglas* this Court held that an indigent defendant is entitled to the appointment of counsel on appeal. In the instant case petitioner was afforded counsel on appeal.

In *Anders* this Court held that appointed counsel's bare-no-merit conclusionary letter did not comply with due process because such procedure failed to furnish an indigent defendant with counsel acting in the role of an advocate. In the instant case appointed counsel filed a brief and orally argued the case.

Petitioner's contention is, therefore, under the circumstances of this case, not a claim of denial of counsel on appeal but rather a contention that appointed counsel should have filed a supplemental brief regarding application of the *Chapman* case and that his failure to do so violated due process. There are many opinions rendered by this and other Courts which substantially alter the constitutional rights of a defendant in a criminal trial. Such opinions affect literally hundreds or thousands of cases pending on appeal throughout this nation. Yet it has never been contended that due process requires that appellate counsel, whether appointed or retained, must file a supplemental brief in each case so affected. It is submitted that appointed counsel's failure to file a supplemental brief in the instant case did not violate due process.

CONCLUSION

For the reason that this Court is without jurisdiction, respondent respectfully urges that the writ of certiorari be dismissed. In the alternative for the reasons previously set forth, respondent respectfully urges that the decision of the Court of Appeal be affirmed.

Dated: San Francisco, California
April 8, 1969

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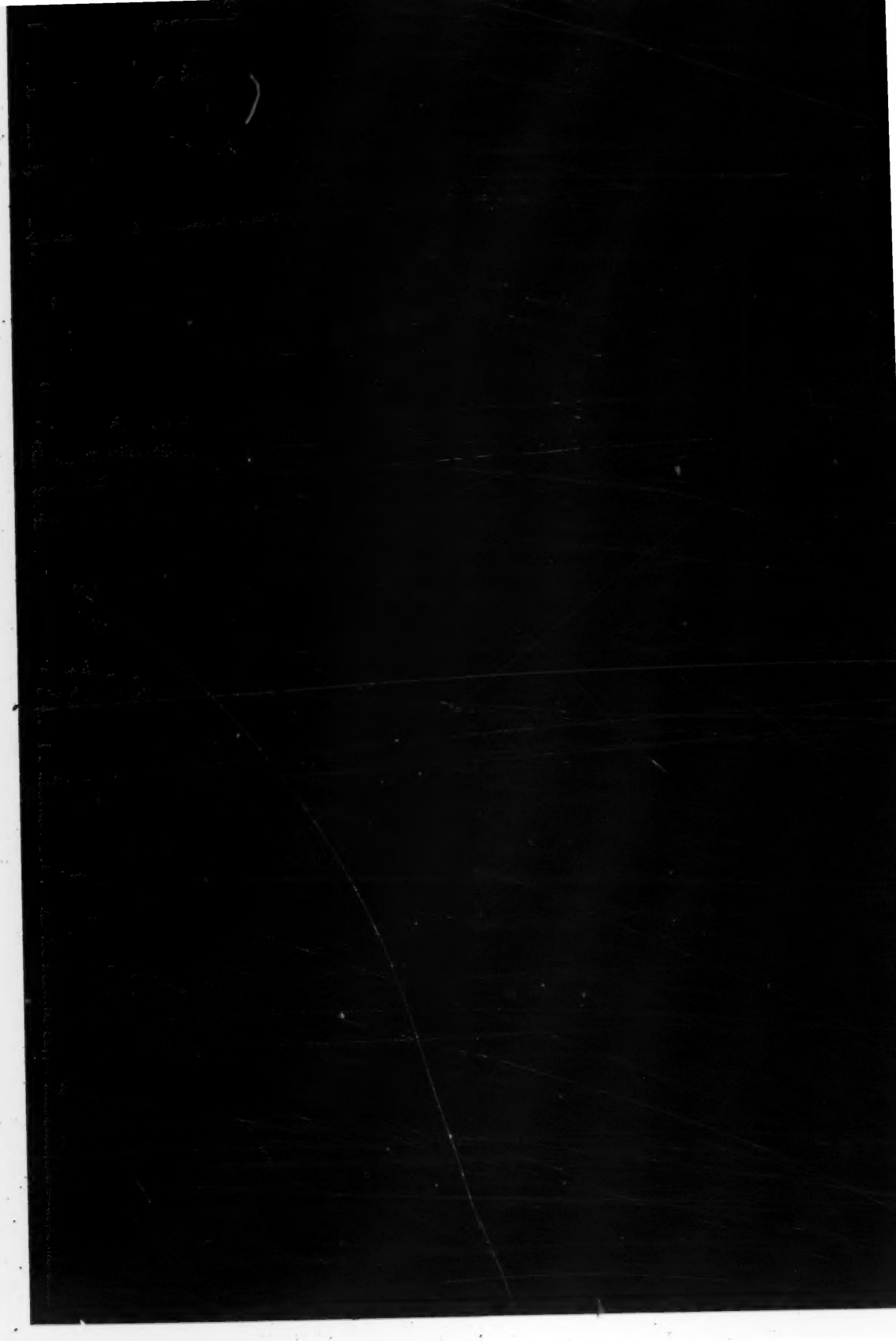

Appendix

United States Constitution

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code

Title 28

28 U.S.C. § 1257 (1964), 62 Stat. 929 (1948)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution,

treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

California Constitution

Article VI, § 12

Sec. 12. The Supreme Court may, before decision becomes final, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has jurisdiction.

California Penal Code

§ 213. Punishment.

Robbery is punishable by imprisonment in the state prison as follows:

1. Robbery in the first degree for not less than five years.

2. Robbery in the second degree, for not less than one year. (Enacted 1872. As amended Stats. 1923, c. 128, p. 271, § 1.)

§ 664. Attempts; punishment.

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts as follows:

1. Offense punishable by five years or more. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one-half

the longest term of imprisonment prescribed upon a conviction of the offense so attempted; provided, however, that if the crime attempted is one in which there is no maximum sentence set by law or in which the maximum sentence is life imprisonment or death the person guilty of such attempt shall be punishable by imprisonment in the state prison for a term of not more than 20 years.

2. Offense punishable by less than five years. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year.

3. Offense punishable by fine. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

4. Offense punishable by imprisonment and fine. If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction of the offense so attempted. (Enacted 1872. As amended Stats. 1923, c. 295, p. 625, § 1; Stats. 1931, c. 481, p. 1050, § 1; Stats. 1953, c. 713, p. 1983, § 1.)

§ 954. Charge of multiple offenses or different statements of same offense; consolidation of accusatory pleadings; election not required; conviction on multiple charges; statement in verdict or finding; separate trials; acquittal on some counts.

An accusatory pleading may charge two or more different offenses connected together in their commission, or

different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading; but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count. (Enacted 1872. As amended Code Am. 1873-74, c. 614, p. 437, § 44; Code Am. 1880, c. 47, p. 13, § 18; Stats. 1905, c. 574, p. 772, § 1; Stats. 1915, c. 452, p. 744, § 1; Stats. 1927, c. 611, p. 1042, § 1; Stats. 1951, c. 1674, p. 3836, § 45.)

California Rules of Court

Rule 28. Hearing in Supreme Court.

(a) [Time within which court may grant hearing.] Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision, and within the original 30-day period the Supreme Court may for good cause extend the time not to exceed an additional 30 days. As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan. 1, 1961; Jan. 2, 1962.

(b) [Time for filing petition.] A party seeking a hearing must serve and file a petition therefor within 10 days

after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of three copies of a printed petition or a petition prepared by other process of duplication in lieu of printing or one copy of a typewritten petition to the clerk of the Court of Appeal which rendered the decision. When such copies are delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court. As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan. 2, 1962.

(c) [Time for filing answer.] An answer may be served and filed within 20 days after the decision becomes final as to the Court of Appeal. As amended, effective Jan. 1, 1957; Jan. 1, 1959.

(d) [Form of petition and answer.] Insofar as practicable, the petition and answer shall conform to the provisions of rule 15, and each copy of the petition shall contain or be accompanied by a copy of the opinion of the Court of Appeal, showing the date of its filing.

(e) [Determination of petition.] A hearing in the Supreme Court, after decision in the Court of Appeal, may be granted by an order, signed by at least four judges assenting thereto, and filed with the clerk. The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time specified in subdivision (a) of this rule, the peti-

tion for hearing shall be deemed denied and the clerk shall enter a notation in the register to that effect.

(f) [Oral argument.] When a hearing is granted, the cause shall be placed on the calendar for oral argument, unless oral argument is waived.

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